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*THE PROCEEDINGS  
IN AN ACTION  
IN THE CHANCERY  
AND  
QUEEN'S BENCH DIVISIONS.*

RICHARD HALLILAY.

SECOND EDITION

Cw. U.K.

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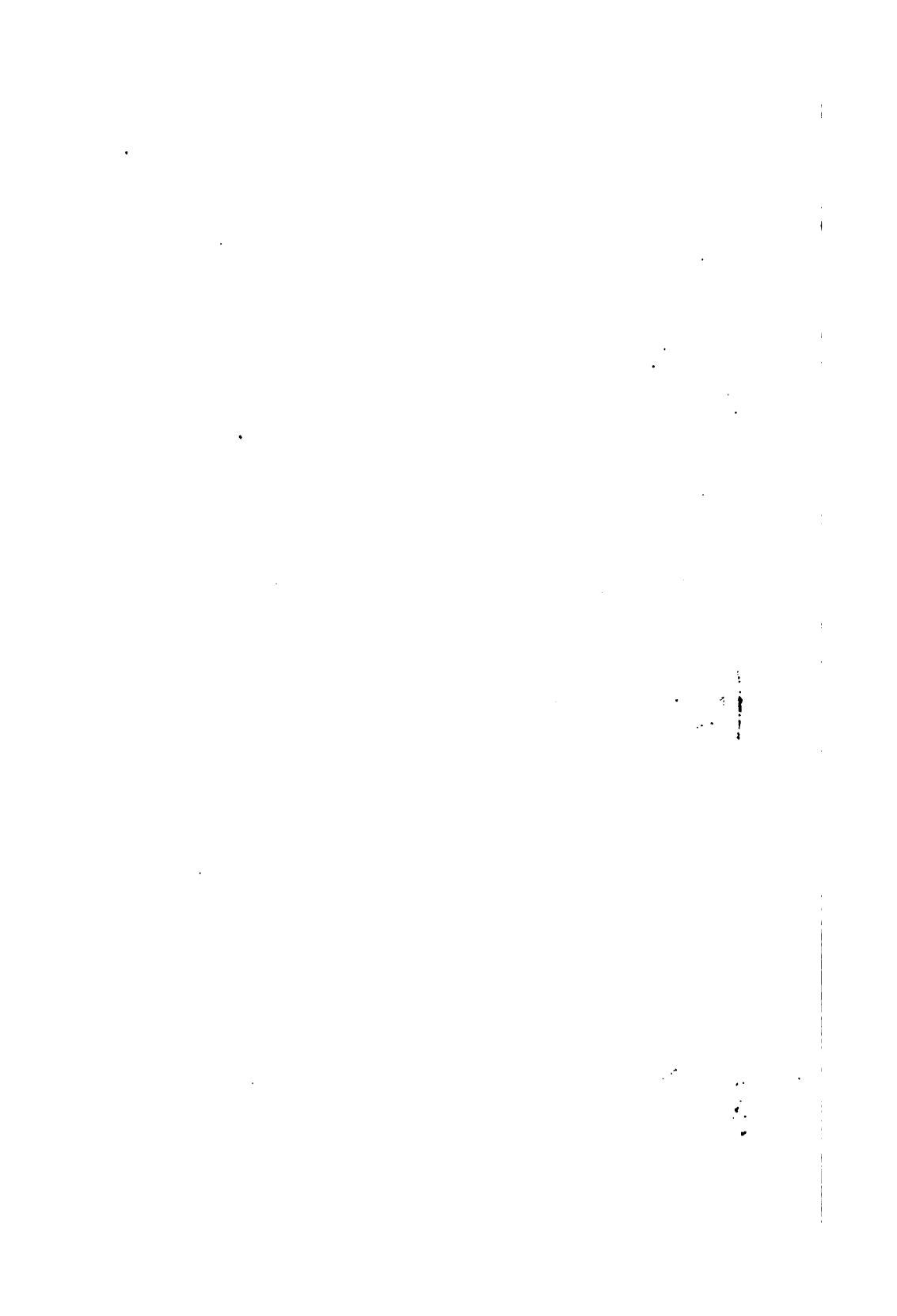
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A  
CONCISE VIEW  
OF THE  
PROCEEDINGS IN AN ACTION  
IN THE CHANCERY DIVISION OF THE HIGH  
COURT OF JUSTICE

INCLUDING  
THE PRACTICE ON APPEAL.

ALSO  
A SUMMARY OF THE PROCEEDINGS IN AN ACTION IN  
THE QUEEN'S BENCH DIVISION OF THE HIGH COURT OF  
JUSTICE, SHOWING IN WHAT PARTICULARS THE  
PRACTICE IN AN ACTION IN THE CHANCERY AND QUEEN'S  
BENCH DIVISIONS DIFFERS.

By RICHARD HALLILAY, Esq.,

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW, LATE HOLDER OF AN EXHIBITION  
AWARDED BY THE COUNCIL OF LEGAL EDUCATION, AND ALSO OF THE  
STUDENTSHIP OF THE FOUR INNS OF COURT.  
AUTHOR OF "A DIGEST OF THE EXAMINATION QUESTIONS AND ANSWERS,"  
"THE LAW AND PRACTICE OF CONVEYANCING," ETC.

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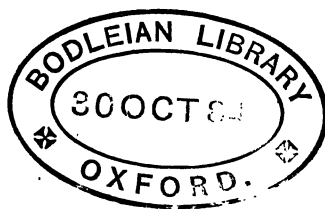
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## Preface to the Second Edition.

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THE first edition of this work has been for some years out of print. During that time the mode of procedure in actions has been remodelled by the Judicature Acts, and the Rules of Court made thereon, and uniformity of practice has, to a very great extent, been introduced into the Chancery and Queen's Bench Division of the High Court. While still adhering to the original plan of the book, I have, nevertheless, in this edition, added a summary of the proceedings in an action in the Queen's Bench Division, showing in what particulars the practice in actions in the Queen's Bench and Chancery Divisions differs.

No claim is put forward that this book is anything more than a concise record of the ordinary practice in an action in the Chancery and Queen's Bench Divisions of the High Court; but it is hoped that it is sufficiently full as a first book for the use of students.

The alterations in practice made by the Rules of the Supreme Court, 1883, the additional Rules of 1884, and the Funds Rules, 1884, have been included in the text.

L. Eng. A. 23. e. 137

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SECTION 1.	
Mode of Appearance ... ..	page 48
SECTION 2.	
Proceedings on default of Appearance, &c. ... ..	52
CHAPTER IV.	
General Rules as to Pleadings, Applications, and Time	55
SECTION 1.	
General Rules as to Pleadings ... ..	55
SECTION 2.	
General Rules as to Interlocutory Applications ... ..	60
SECTION 3.	
General Rules as to Time ... ..	62
CHAPTER V.	
Summons for Directions ... ..	65
CHAPTER VI.	
Statement of Claim ... ..	67
CHAPTER VII.	
The Defence... ..	72
SECTION 1.	
Statement of Defence ... ..	73
SECTION 2.	
Counter-Claim ... ..	77
SECTION 3.	
Joinder by Defendant of Third Persons as Parties by Notice ... ..	81
SECTION 4.	
Payment into Court in satisfaction of Plaintiff's Claim	84
SECTION 5.	
Payment or Transfer into Court to abide the Event of the Action ... ..	86

---

SECTION 6.	
Payment or Transfer out of Court ... ..	page 90
SECTION 7.	
Withdrawal of Defence ... ..	93
CHAPTER VIII.	
The Plaintiff's Proceedings after Defence ... ..	94
SECTION 1.	
Reply by Plaintiff ... ..	94
SECTION 2.	
Reply by Persons other than the Plaintiff ... ..	96
SECTION 3.	
Pleadings subsequent to Reply... ..	96
SECTION 4.	
Joinder of Issue and close of the Pleadings ... ..	97
SECTION 5.	
Discontinuance ... ..	98
CHAPTER IX.	
Modes of raising Points of Law ... ..	100
1. Pleading in lieu of Demurrer ... ..	100
2. Special Case ... ..	101
CHAPTER X.	
Discovery ... ..	104
SECTION 1.	
Interrogatories as to Facts ... ..	104
SECTION 2.	
Discovery of Documents ... ..	111
SECTION 3.	
Production and Inspection ... ..	113



CHAPTER XI.	
Evidence ... ..	page 117
SECTION 1.	
<i>Viva Voce</i> Evidence ... ..	117
SECTION 2.	
Examination <i>de bene esse</i> ... ..	125
SECTION 3.	
Affidavit Evidence ... ..	126
SECTION 4.	
Documentary Evidence ... ..	132
SECTION 5.	
Perpetuating Testimony ... ..	134
CHAPTER XII.	
SECTION 1.	
Notice and Entry of Trial... ..	136
SECTION 2.	
Short Causes ... ..	138
CHAPTER XIII.	
The Trial ... ..	139
Inquiry and Trial before a Referee ... ..	142
CHAPTER XIV.	
New Trial ... ..	147
CHAPTER XV.	
Judgment ... ..	150
CHAPTER XVI.	
Enforcement of Judgments ... ..	159
CHAPTER XVII.	
Interlocutory Applications ... ..	171

---

SECTION 1.	
Motions	... page 171
SECTION 2.	
Petitions	... 184
SECTION 3.	
Summons at Chambers	... 188
CHAPTER XVIII.	
Appeal	... 192
SECTION 1.	
To the Court of Appeal	... 192
SECTION 2.	
To the House of Lords...	... 198
CHAPTER XIX.	
Proceedings in District Registries	... 202
CHAPTER XX.	
Transfer of Actions	... 206
1. From one Division to another	... 206
2. From one Judge of the Chancery Division to another	... 207
3. From and to District Registries	... 208
4. From and to County Courts	... 210
CHAPTER XXI.	
Change of Parties by Death, Marriage, &c.	... 212
CHAPTER XXII.	
Proceedings in Chambers	... 216
Originating Summons	... 216
Summons to Proceed	... 219
CHAPTER XXIII.	
Further Considerations	... 231

**CHAPTER XXIV.**

Costs .... page 233

**CHAPTER XXV.**

Summary of the Proceedings in an Action in the  
Queen's Bench Division ... 239

**CHAPTER XXVI.**

Solicitor and Client ... 286

---

## TABLE OF CASES.

---

Andrew <i>v.</i> Aitken ... ..	...page 213
Ansty <i>v.</i> Woolwich Subway Company ... ..	108
Aste <i>v.</i> Stumore... ..	110
Attorney-General <i>v.</i> Corporation of Birmingham ... ..	59
Attorney-General <i>v.</i> Emerson ... ..	108
Bannacott <i>v.</i> Harris... ..	111
Barber <i>v.</i> Blaiberg ... ..	77
Barton <i>v.</i> Titchmarsh ... ..	192
Beddall <i>v.</i> Maitland... ..	77
Berkley <i>v.</i> Standard Investment Company... ..	107
Bidder <i>v.</i> McLean ... ..	100
Birmingham Estates Company <i>v.</i> Smith ... ..	78
Blewit <i>v.</i> Dowling ... ..	207
Booth <i>v.</i> Trail ... ..	168
Bowen, <i>Re</i> ; Bennet <i>v.</i> Bowen ... ..	204
Bower <i>v.</i> Hartley ... ..	82
Boyce, <i>Re</i> ... ..	119
Boyd's Trusts, <i>Re</i> ... ..	208
Boynton <i>v.</i> Boynton... ..	214
Brassington <i>v.</i> Cussons ... ..	204
British, &c., Company <i>v.</i> Wright ... ..	112
Brown <i>v.</i> Collins ... ..	193, 197
Brown <i>v.</i> North ... ..	29
Brown <i>v.</i> Pearson ... ..	151
Brown <i>v.</i> Sewell ... ..	115
Brown <i>v.</i> Tibbetts ... ..	288
Brown, <i>Re</i> ; Ward <i>v.</i> Morse ... ..	81
Budding <i>v.</i> Murdock... ..	69

Buller's Wharf Company, <i>Re</i> ... ..	...page	230
Burgoyne v. Taylor... ..		141
Burstall v. Bryant ... ..		191
Burstall v. Fearon ... ..		215
Bustross v. White ... ..		115
Canadian Oil Works v. Hay ... ..		63
Cash v. Parker... ..		179
Cashin v. Craddock... ..		70, 112
Cawley v. Burton ... ..		107
Chapman v. Day ... ..		213
Chapman, <i>Re</i> ... ..		219
Chapman v. Mason ... ..		208
Chesterfield Colliery Company v. Black ... ..		108
Chichester v. Chichester... ..		134
Chorlton v. Dickie ... ..		140
City of Mecca, <i>Re</i> ; <i>Re</i> Smith ... ..		44
Clarapede and Co. v. Commercial Union ... ..		58
Clark v. Bradlaugh... ..		18
Clark v. Cookson ... ..		140
Clark v. Cullen... ..		29
Clements v. Norris ... ..		207
Colebourne v. Colebourn ... ..		175, 179
Cook v. Dey ... ..		45
Cook v. Wilby ... ..		129
Cooper, <i>Re</i> ; Cooper v. Vesey ... ..		22
Corrie v. Allen... ..		82
Corsellis, <i>Re</i> ... ..		116
Coulburn v. Carshaw ... ..		41, 45
Cox v. Barker ... ..		27
Coyle v. Cummins ... ..		70
Credit Company, <i>Re</i> ... ..		114
Crofton v. Crofton ... ..		119
Crowe v. Barnicott ... ..		78
Cruikshank v. Floating Bath Company ... ..		264
Curtis v. Sheffield ... ..		194, 214
Dann v. Simmons ... ..		149
Darcey v. Whitaker... ..		214

*Table of Cases.*

xiii

Darnford <i>v.</i> McNulty	... ..	page 75
Davenport <i>v.</i> Ward	... ..	270
Davey Brothers <i>v.</i> Garnett	... ..	70
Dawson <i>v.</i> Beeson	... ..	153, 271
De Hart <i>v.</i> Stevenson	... ..	19
D'Hormusgee and Co. <i>v.</i> Grey	... ..	237
Disney <i>v.</i> Longbourne	... ..	106
Dolman <i>v.</i> Jones	... ..	149
Doyle <i>v.</i> Kaufman	... ..	46
Drover <i>v.</i> Beyer	... ..	182
Duchess of Kingston's case	... ..	134
Ducket <i>v.</i> Gover	... ..	34
Dymond <i>v.</i> Croft	... ..	46
Eaton <i>v.</i> Storer	... ..	94
Ellis <i>v.</i> Ambler	... ..	106
Elson, <i>Re</i>	... ..	193
English <i>v.</i> Tottie	... ..	115
Evelyn <i>v.</i> Chippendale	... ..	237
Eyre <i>v.</i> Cox	... ..	46
Flower <i>v.</i> Lloyd	... ..	193, 197
Fore Street Warehouse Company <i>v.</i> Durrant	... ..	41
Fowler <i>v.</i> Barstow	... ..	44
Fowler <i>v.</i> Knoop	... ..	83
Fraser <i>v.</i> Cooper, Hall and Co.	... ..	28, 79
Freeman <i>v.</i> Cox	... ..	87
Fryer <i>v.</i> Wiseman	... ..	127
Furness <i>v.</i> Booth	... ..	78
Gardner <i>v.</i> Irwin	... ..	112
Gatti <i>v.</i> Webster	... ..	52
Gilbert <i>v.</i> Comedy Opera Company	... ..	130
Glossop <i>v.</i> Heston Local Board	... ..	178
Golding <i>v.</i> Wharton Saltworks Company	... ..	193
Gordon <i>v.</i> Jennings; Cardiff, &c., Harbour Company, Garnishees	... ..	167
Graham <i>v.</i> Campbell	... ..	176
Gray <i>v.</i> Bell	... ..	158
Gray <i>v.</i> Webb	... ..	77, 80

Grumbrecht v. Parry	... ..	...page 107
H.'s Estate, <i>Re</i> ...	... ..	179
Hall v. Liardet...	... ..	105
Hancocks v. Lablach	... ..	29
Harbord v. Monk	... ..	105
Harlock v. Ashbury...	... ..	196
Harris v. Gamble	... ..	74, 77, 80
Harris v. Jenkins	... ..	76
Harrison v. The Cornwall Minerals Railway Company	... ..	103
Hartley v. Owen	... ..	109
Hayson, <i>Re</i>	... ..	168
Heard v. Borgwaldt	... ..	35
Heatley v. Newton	... ..	194
Hugh v. Chamberlain	... ..	76
Higginson v. Hall	... ..	116
Hills v. Springett	... ..	213
Hoch v. Boor	... ..	143
Hoffman v. Postil	... ..	106
Holloway v. York	... ..	206
Horton v. Bott	... ..	106, 108
Hume v. Druyff	... ..	280
Hunnings v. Williamson	... ..	108
Hurst v. Padwick	... ..	237
Hutchinson v. Ward	... ..	204
Hutley, <i>Re</i> ...	... ..	208
Indian, &c., Mining Company, <i>re</i> ...	... ..	196
Ingram v. Little	... ..	116
Jackson v. Litchfield	... ..	29
James v. Barraud	... ..	23
James v. Crow	... ..	141
Jameson and Co. v. Brick and Stone Company	... ..	26
Jaques v. Harrison	... ..	157
Jiminez v. Owen	... ..	189, 277
Johnson v. Burgess	... ..	39
Johnson v. Smith	... ..	112
Jones v. Monte Video Gas Company	... ..	113
Jones v. Quin	... ..	74

*Table of Cases.*

xv

Joy v. Hadley ... ..	...page 113
Jubb v. Bibbs and Hill ... ..	110
Kearsley v. Phillips... ..	108
Kendrick v. Roberts ... ..	38
Knight's Trusts, <i>Re</i> ... ..	193
Krehl v. Burrell ... ..	149, 177
Lane v. Lane ... ..	218
Langdon v. Tate ... ..	119
Lawton v. Elwes ... ..	116
Lea v. Collier ... ..	80
Leigh v. Brooks ... ..	143
Lewis, <i>Re</i> ; <i>Ex parte</i> Munroe ... ..	287
Liardet v. Hammond Electric Light and Power Company ...	76
Limehouse Board of Works, <i>Ex parte</i> ... ..	92
Litchfield v. Jones ... ..	164
Llewellyn, <i>Re</i> ; Lane v. Lane... ..	218
Longman v. East ... ..	142, 143
Lovell v. Wallis ... ..	127
Lowe v. Lowe ... ..	149
Lydall v. Martinson... ..	142
Lydney and Wigpool Iron Ore Company v. Bird ... ..	238
Lyell v. Kennedy ... ..	106, 258
McGowan v. Middleton ... ..	81
McHenry v. Lewis ... ..	40
Manchester Economic Building Society, <i>Re</i> ... ..	194
Manchester Val de Travers Paving Company v. Slagg ... ..	193
Marriott v. Marriott ... ..	70
Martin v. Fife ... ..	264
Mellor v. Porter ... ..	158
Mercier v. Cotton ... ..	105
Mercier v. Williams... ..	199
Mersey Dock Commissioners v. Jones... ..	102
Metcalf v. The British Tea Association ... ..	62
Meyrick v. James ... ..	132
Miller v. Pilling ... ..	145
Molloy v. Kelley ... ..	105
Morgan's Patent, <i>Re</i> ... ..	10



Morton v. Miller	... ..	page 61
Mulcaster, <i>Re</i>	... ..	109
Munster v. Railton	... ..	29
Nadon v. Bassett	... ..	119
Newbiggin-by-Sea Gas Company v. Armstrong	... ..	286
Newbould v. Stead	... ..	206, 284
New Callao, <i>Re</i>	... ..	194
New Westminster Brewery Company v. Hannah	... ..	127
Nichols v. Evans	... ..	84, 253
Noble v. Stow	... ..	87
Norton v. Gover	... ..	175, 179
Oldale v. Whitehead	... ..	237
Original Hartlepool Colliery Company v. Gibbs	... ..	77
Ormrod v. The Todmerden Joint Stock Mill Company	... ..	143
Padwick v. Scott	... ..	77, 80
Parker, <i>Re</i> ; Cash v. Parker	... ..	179
Parsons and another v. Burton	... ..	101
Peruvian Guano Company v. Bockwoldt	... ..	40
Pierey v. Young	... ..	140
Pitton v. Chatterbury	... ..	111
Poloni v. Gray	... ..	183
Pomerania, The	... ..	98
Pontifex v. Ford	... ..	253
Prestney v. Corporation of Colchester	... ..	115
Quartz Hill, &c., Company, <i>Re</i>	... ..	132
Quilter v. Tod Heatley	... ..	114
Radecliffe, <i>Re</i>	... ..	179
Raeburn v. Andrews	... ..	237
Ramsbottom v. Shropshire Union Railway and Canal Company	... ..	106
Redondo v. Chaytor	... ..	237
Renshaw v. Renshaw	... ..	58, 69
Republic of Costa Rica v. Erlanger	... ..	237
Risca Coal Company, <i>Re</i>	... ..	156
Rock Portland Cement Company v. Wilson	... ..	177
Robson v. Lees	... ..	265
Roffey v. Miller	... ..	214
Saunders v. Jones	... ..	106

*Table of Cases.*

xvii

Secretary for War v. Chubb ... ..	page 176
Severance v. Civil Service Supply Association ... ..	24, 237
Shearman v. Findlay ... ..	44
Skipper v. Skipper ... ..	141
Smith, <i>Re</i> ; Hutchinson v. Ward ... ..	204
Smith v. De Berg ... ..	108
Smith v. Dobin... ..	50
Smith v. Grindley ... ..	195
Smith v. Read and others ... ..	110
Smith v. Watts... ..	189, 223
Spencer, <i>Re</i> ; Spencer v. Hart ... ..	196
Spetigue's Trust, <i>Re</i> ... ..	234
Springall and Goldsack's Contract, <i>Re</i> ... ..	120
Sproat v. Peckett ... ..	38, 46
Stahlschmidt v. Walford... ..	99
Stockton Iron Company, <i>Re</i> ... ..	193
Street v. Crump ... ..	95
Sugden v. Lord St. Leonards... ..	198
Sneesby v. Lancashire and Yorkshire Railway Company... ..	195
Tawell v. Slate Company ... ..	45
Taylor v. Batten ... ..	112
Tildsley v. Harper ... ..	58
Thomas v. Palin ... ..	160
Towse v. Loveridge... ..	83
Threlfall v. Wilson ... ..	24, 237
Turner v. Hancock ... ..	193
Union Bank of London v. Manby... ..	112
United Telephone Company v. Dale ... ..	176
Usil v. Brearley ... ..	196
Val de Travers Paving Company v. London Tramways Com- pany ... ..	34
Vallance, <i>Re</i> ... ..	92
Vanderwell v. Vanderwell ... ..	156
Vicary v. Great Northern Railway Company ... ..	108
Vivian v. Little ... ..	116
Waddell v. Blockey... ..	195
Walker v. Easterly ... ..	237

Wallis v. Jackson ... ..	page 36
Ward v. Morse ... ..	81
Ward v. Pilley ... ..	143
Warner v. Moses ... ..	127
Warner v. Murdock... ..	140
Webb v. East ... ..	115
Webb v. Sutton and others ... ..	167
Webster v. Whewall ... ..	114
Werderman v. Société Générale de Electricité ... ..	27
Westhead v. Riley ... ..	167, 179
Williamson v. London and North-Western Railway Company	95
Wilson v. Church ... ..	107
Wilson v. De Coulon ... ..	122
Winterfield v. Bradnum... ..	237
Witham v. Vane ... ..	83
Wood v. Wheeler ... ..	163
Wright v. Swindon, &c., Railway Company ... ..	212
Wye Valley Railway Company v. Hawse ... ..	82
Young, <i>Ex parte</i> ... ..	132

## ERRATA.

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- Page 11, note (a), after "39" add "39 & 40 Vict. c. 59, s. 17."
- Page 14, note (d), for "38" read "37."
- Page 41, note (c), for "Corshaw" read "Carshaw."
- Page 53, line 27, after "actions" delete "usually."
- Page 58, note (h), after "151" add "id. 262."
- Page 59, note (a), after "127" add "but see *Keith v. Butcher*, 32 W. R. 378."
- Page 62, line 4, after "and" add "dated, and according to the former practice also."
- Page 83, note (e), after "151" add "25 Ch. Div. 76."
- Page 95, note (f), after "397" add "25 Ch. Div. 68."
- Page 101, note (b), for "1283" read "1883," and after "215" add "and see *Burstall v. Beyfus*, 32 W. R. 418."
- Page 107, note (d), after "570" add "32 W. R. 558, C. A."
- Page 110, note (c), after "C. A." add "53 L. J. 82, Q. B."
- Page 141, note (e), for "65, rr." read "65, r. 27, sub-rr."
- Page 157, note (e), after "165" add "50 L. T. Rep. N. S. 246, C. A."
- Page 164, note (b), after "65" add "32 W. R. 288."
- Page 219, note (f) after "65, r." add "27, sub-r."



# A CONCISE VIEW

OF THE

## PROCEEDINGS IN AN ACTION IN THE CHANCERY DIVISION OF THE HIGH COURT.

---

### ORIGIN AND HISTORY OF THE COURT OF CHANCERY.

THE Court of Chancery, now a division of the High Court of Justice, seems to have derived its origin from the great Aula Regis, or rather from the King's ordinary council. It has its name of Chancery (*cancellaria*) from the judge who presides, the Lord Chancellor, or *cancellarius*, who, Sir Edward Coke tells us, is so termed a *cancellando*, from cancelling the King's letters patent when granted contrary to law. (a) His office has been traced down to the reign of Henry II.; he was then almost always a high dignitary of the Church, and besides his independent legal jurisdiction it would appear that this great officer was the principal actor as regards the judicial business which the select council, as well as the great council, had to advise upon or transact. (b)

It was a custom of Edward I. to send certain of the petitions addressed to him, praying extraordinary remedies, to the Chancellor or the Master of the Rolls, by writ under

---

(a) See 3 Steph. Com. 320, ed. 7; | (b) 1 Spence's Eq. 334.  
1 Hallam's Const. Hist. 469, ed. 3. |

the Privy Seal, directing them to give such remedy as should appear to be consonant to honesty. When the Chancellor administered relief independently of the council, it was by express delegation from the King, and given, as it would seem, by the advice of the council. (a)

In the reign of Edward II. it appears from several records that the Court of Chancery was then in full operation. (b)

In the reign of Edward III. the Court of Chancery, as a court of *ordinary jurisdiction*, became of great importance. The Chancellor, under his ordinary jurisdiction, held pleas of *scire facias* for repeal of letters patent, of petitions of right and *monstrans de droit* for obtaining possession or restitution of property from the Crown, traverses of offices, *scire facias* upon recognisances, executions upon recognisances and upon statutes, and pleas of all personal actions by or against any officer or minister of the Court of Chancery. The Chancellor also held jurisdiction on appeals of false judgment when any lord would not do right to those under his jurisdiction. He was visitor of colleges, &c., of royal foundation, and had jurisdiction over the King's wards; and also in all cases in which the Crown was concerned. (c)

The proceedings in all, or most of these cases, were by common law process, not by petition or bill. But the Chancellor, in the exercise of his ordinary or common law jurisdiction, could not advert to matters of conscience; and on issue being joined on a matter of fact in a cause before him in his ordinary court, it was tried in the Court of King's Bench, for he never had authority to summon a jury. (d)

In the reign of Edward III. also the Court of Chancery appears as a distinct court for giving relief in cases which required *extraordinary* remedies. The King, being otherwise too much engaged to attend to the numerous petitions pre-

(a) 1 Spence's Eq. 335, 336.

(b) 1 Spence's Eq. 336; and see cases collected, 1 Camp. Lives of Lord Chancellors, 206-209.

(c) 1 Spence's Eq. 336, 337.

(d) 1 Spence's Eq. 337.

sented to him, he, in the twenty-second year of his reign, by a writ or ordinance, referred all such matters as were of *grace* to be despatched by the Chancellor or by the keeper of the Privy Seal; thus conferring a general authority to give relief in all matters requiring the exercise of the prerogative of grace. From this time suits by petition, without any preliminary writ, became a common course of procedure before the Chancellor, as it had been in the council. On the petition being presented, if the case called for extraordinary interference, a writ was issued by the command of the Chancellor, but in the name of the King, by which the party complained against was summoned to appear before the Court of Chancery to answer the complaint and abide by the order of the court. One great engine for the discovery of truth, which was then unknown to the common law, namely, the examination of the parties on oath, was employed by this tribunal, by means of a writ of subpoena, said to have been invented by Waltham, Bishop of Salisbury, keeper of the rolls, about 5th Richard II. (a)

The principles on which the decisions of the Chancellor in the exercise of the extraordinary jurisdiction thus committed to him were founded, were, it would appear, those of honesty, equity, and conscience. (b)

In the reign of Edward III. the Court of Chancery, as well as the Court of King's Bench, ceased to follow the King. (c)

Early in the reign of Richard II. the Chancellor, the King being young, with the sanction, no doubt, of the council, though in opposition to the Commons, exercised an authority in favour of the weak and poor for repressing disorderly obstructions to the course of the law, and punishing the defaults of the officers who were intrusted with its administration, and affording a civil remedy in cases of violence and

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(a) 1 Spence's Eq. 337-339; Hallam's Const. Hist. 470, vol. 1, ed. 3; Story's Eq. ss. 44, 46.

(b) 1 Spence's Eq. 339.

(c) 1 Spence's Eq. 340.



outrage which, for whatever reason, could not be effectually redressed through the ordinary tribunals. (a)

In this reign petitions, or bills, as they were afterwards called, were addressed directly to the Chancellor himself; most of them founded on some outrage or violence from which redress is sought. (b)

The Commons not succeeding in their efforts to extinguish the Chancellor's extraordinary jurisdiction, addressed their petitions to its due regulation, and, as a result, the 17 Rich. 2, c. 6, enacted that, where persons were compelled to appear before the council or the Chancery on suggestions found to be untrue, the Chancellor should have the power to award damages according to his discretion. From the time of the passing of this statute it is considered that the Court of Chancery was established as a distinct and permanent court, having separate jurisdiction, with its own peculiar mode of procedure similar to that which had prevailed in the council, though perhaps not yet wholly separated from the council. Petitions for extraordinary remedies were still presented to the King, but they were usually referred by him to the Chancellor, who at this time was assisted in the exercise of his judicial duties, legal and equitable, by the Master of the Rolls. (c)

No bills addressed to the Chancellor in the reign of Henry IV. have been found, and few in the reign of Henry V., though uses and trusts had then become general; but the bills now began to be in English. In the reign of Henry VI. the Court of Chancery was in full operation, and large additional powers of coercion were conferred on the Chancellor in particular cases. The writs in the reign of Henry VI. refer to the proceedings as being *in cancellariâ*, without reference to the council. From this time the bills

(a) 1 Spence's Eq. 342, 343; Hallam's Const. Hist. 469, vol. 1, ed. 3; Story's Eq. ss. 46, 48, and note.

(b) 1 Spence's Eq. 344; Story's Eq. s. 48.

(c) 1 Spence's Eq. 345, 346.

appear to have been filed. In the reign of Edward IV. proceedings by bill and subpoena became the daily practice of the Court of Chancery; and, though the common law judges continued to dispute the Chancellor's authority to interfere with the proceedings of the common law courts, there appears to be no evidence of further opposition on the part of the Commons to the authority of the Court of Chancery; and down to the reign of Charles II. the court continued to be substantially the same as it was in the reign of Edward IV. (a)

The introduction of uses or trusts about the close of the reign of Edward III., which we find established in the reign of Henry VIII., gave new activity and extended operation to the jurisdiction of the court, but, as before shown, it did not found it. The redress given by the Chancellor in such cases was merely a new application of the old principles of the court, as there was no remedy at law to enforce the observance of uses and trusts. (b)

In the reign of James I. a controversy of great heat and violence arose upon the point whether a court of equity could give relief for or against a judgment at common law; and it was mainly conducted by Lord Coke against and by Lord Ellesmere in favour of the Chancery jurisdiction. At last the matter came directly before the King, and upon the advice and opinion of very learned lawyers, to whom he referred it, his Majesty gave judgment in favour of the equitable jurisdiction in such cases. Lord Bacon succeeded Lord Ellesmere, and, by his celebrated ordinances for the regulation of Chancery, gave a systematical character to the business of the court. From this period down to the time when Sir H. Finch (afterwards Earl of Nottingham) was elevated to the bench in the reign of Charles II. (1673), little improvement was made either in the principles or in the practice of Chancery. With Lord Nottingham, however, a new era commenced. He

(a) 1 Spence's Eq. 346-349.

(b) See Story's Eq. s. 49; 1 Spence's Eq. 346, 347.

possessed a thorough comprehension of the true principles of equity, and was thus enabled to expand the remedial justice of the court far beyond the aims of his predecessors. In the course of nine years, during which he presided in the court, he built up a system of jurisprudence and jurisdiction upon wide and rational foundations which served as a model for succeeding judges, and gave a new character to the court, and hence he has been styled "the father of equity." Lord Hardwick is said to have widened the foundation and completed the structure begun and planned by Lord Nottingham. (a)

As will have been collected from what has already been stated, the Chancellor, in early times, was, generally speaking, next to the King, the person of greatest consequence, not only in rank, but in influence and authority, politically as well as judicially; but after Beckett's time his influence was, for the most part, silently exercised in the council, so that the Chancellor seldom appears as a prominent figure in history. The Court of Chancery, from the reign of Henry VI. down to the Commonwealth, consisted of the Chancellor as sole, or at least supreme judge, the Master of the Rolls, and a college of clerks, of which the Master of the Rolls was the chief. In the reign of Edward III. these clerks, who were the assessors or council of the Lord Chancellor, obtained the style or title of masters. (b) The office of Lord Chancellor or Lord Keeper, whose authority by the statute 5 Eliz. c. 18, was declared to be exactly the same, is at this day created by the mere delivery of the Great Seal into his custody; and he has, in addition to his other duties and privileges, precedence (if of the peerage) over every temporal lord. (c)

Besides the office of Chancellor, there is, as before stated, that of Master of the Rolls, called clerk or custos of the Rolls until the reign of Henry VII. It is an office of the highest

(a) Story's Eq. ss. 51, 52.

(b) 1 Spence's Eq. 355, 356, 360.  
The office of Master in Chancery

was abolished by the 15 & 16 Vict.  
c. 80, ss. 1, 2.

(c) 3 Steph. Com. 325, 8th ed.

antiquity, and always gave very high rank. In a statute of 12 Rich. 2 (1388) he is placed before all the judges and next to the Chamberlain. He was, like the Chancellor, a conservator of the peace by prescription, and formerly usually of the clergy. He was generally associated with the Chief Justices in all references made to them for their opinions on great questions on which the Crown desired to be advised. The Master of the Rolls was also frequently appointed to be the Lord Keeper of the Great Seal, but he was sometimes restricted in its use. In early times the appointment to the office of Master of the Rolls does not appear, of itself, to have conferred judicial authority. The exercise of judicial authority by him is to be traced from the reign of Edward I. downwards. From the reign of Henry VI. there are bills for relief addressed to him. But the judicial duties of the Master of the Rolls, excepting such as were specially conferred by commission from the Crown, appear to have more properly belonged to him in the character of one of the masters (a) who have been briefly noticed. Indeed, in modern times doubts were entertained as to the judicial authority of the Master of the Rolls; to settle which it was declared, by 3 Geo. 2, c. 30, that all orders and decrees made by him, except such as, by the course of the court, were appropriated to the Great Seal alone, should be deemed to be valid, subject, nevertheless, to be discharged or altered by the Lord Chancellor. And by the 3 & 4 Will. 4, c. 94, s. 24, the Master of the Rolls (subject to the same qualification) was specially directed to hear motions, pleas, and demurrers, as well as causes generally, which should be set down for hearing before him. (b)

The business of the court increased so much that it became necessary, in the year 1813, to appoint another assistant to the Lord Chancellor in his judicial functions, under the title of Vice-Chancellor of England. This was done by the

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(a) 1 Spence's Eq. 100, 357-359. | (b) 3 Steph. Com. 334, 8th ed.

statute of 53 Geo. 3, c. 24; and after the transfer of the equity business of the Court of Exchequer to the Court of Chancery, which took place in the year 1841, two more Vice-Chancellors were appointed, each sitting, like the Master of the Rolls, separately from the Lord Chancellor. (a)

By the 14 & 15 Vict. c. 83 (amended by the 30 & 31 Vict. c. 64, s. 1), two judges, called the Lords Justices of the Court of Appeal in Chancery, were appointed; and this Court of Appeal consisted, when the Judicature Acts came into operation, of the Lord Chancellor, together with these Lords Justices, and such court possessed all the jurisdiction exercised by the Lord Chancellor, so far as the judicial business in Chancery was concerned, without prejudice, however, to his right to sit, as formerly, alone. From this court an ultimate appeal lay to the House of Lords.

Such were the judges of the Court of Chancery at the time of the passing of the Judicature Acts.

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(a) See 3 Steph. Com. 334, 8th ed. In the reign of Henry VIII. the Master of the Rolls is sometimes	styled Vice-Chancellor: (1 Spence Eq. 359.)
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## CHAPTER I.

### SECTION I.

#### THE COURTS, JUDGES, AND OFFICERS UNDER THE JUDICATURE ACTS.

By the 36 & 37 Vict. c. 66 (Judicature Act, 1873), the Supreme Court of Judicature was created, and the High Court of Chancery, including the jurisdiction of the Master of the Rolls, the Courts of Queen's Bench, Common Pleas, and Exchequer, and the Courts of Probate, Divorce, and Admiralty, ceased to exist as separate courts, and were consolidated together and constitute one Supreme Court of Judicature, which is separated into two great divisions—first, the High Court of Justice; and, secondly, the Court of Appeal. The High Court of Justice is a Superior Court of Record, and has had transferred to and vested in it the jurisdiction formerly possessed and exercised by the courts above named, as also by the Courts of Common Pleas at Lancaster and Durham, the courts created by commissions of assize, of oyer and terminer and gaol delivery, and of every judge thereof, with the following exceptions:—(a)

(1.) The appellate jurisdiction of the Court of Appeal in Chancery, or of the same court sitting as a Court of Appeal in Bankruptcy, or of the Court of Appeal in Chancery of the County Palatine of Lancaster;

(2.) The jurisdiction of the Lord Chancellor or Lords Justices of Appeal in Chancery in relation to the custody of

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(a) Sects. 3, 4, 16, 17, 22, 39.

the persons and estates of idiots, lunatics, and persons of unsound mind ;

(3.) The jurisdiction of the Lord Chancellor in relation to grants of letters patent, (a) or the issue of commissions or other writings to be passed under the Great Seal, or as a visitor of any college, or of any charitable or other foundation ;

(4.) The jurisdiction of the Master of the Rolls in relation to records in London or elsewhere in England.

The High Court of Justice has three divisions, of which the Chancery Division is one. (b) The judges of this division are the Lord Chancellor, who is president thereof, though not a permanent judge of the High Court ; and five judges of first instance. The Master of the Rolls has ceased to be a judge of the High Court of Justice. (c)

A judge of the Court of Appeal may also, upon the request of the Lord Chancellor, sit as a judge of the High Court, and perform any official or ministerial acts for a judge who is absent, or during a judicial vacancy, or as an additional judge of any division ; and while so acting he has all the authority and power of a judge of the High Court. (d)

In any commission of assize, oyer and terminer and gaol delivery, the Queen may (*inter alia*) include any ordinary judge of the Court of Appeal, or any judge of the Chancery Division of the High Court appointed after the commencement of the Judicature Act, 1873, who is liable to go circuit. (e)

Any judge sitting in court is deemed to constitute a court of

(a) The jurisdiction over patents is now vested in the High Court of Justice : (*Re Morgan's Patent*, W. N. 1876, p. 27 ; 46 & 47 Vict. c. 57, s. 28.)

(b) The other divisions are the Queen's Bench Division (of which the London Bankruptcy Court now forms part) ; the Probate, Divorce, and Admiralty Division, the latter

division comprising in reality three separate courts (36 & 37 Vict. c. 66, s. 31 ; Order in Council, Dec. 16, 1880 ; 46 & 47 Vict. c. 52, s. 93).

(c) See 36 & 37 Vict. c. 66, ss. 5, 31 ; 38 & 39 Vict. c. 77, s. 3 ; 44 & 45 Vict. c. 68, s. 2.

(d) 36 & 37 Vict. c. 66, s. 51.

(e) 36 & 37 Vict. c. 66, ss. 29, 37 ; 39 & 40 Vict. c. 59, s. 15.

the High Court of Justice; and he may exercise in court or in chambers all or any part of the jurisdiction by the Judicature Act, 1873, vested in the High Court in all such causes and matters, and in all such proceedings in any causes or matters, as before this Act might have been heard in court or in chambers, respectively, by a single judge of any of the courts whose jurisdiction is transferred to the High Court of Justice. (a)

To the Chancery Division of the High Court is assigned (1) all causes and matters pending in the Court of Chancery at the commencement of the Judicature Act, 1873; (2) all causes and matters commenced after this Act under any Act of Parliament by which exclusive jurisdiction in respect of such causes or matters has been given to the Court of Chancery or to any judge thereof, except appeals from County Courts; and (3) all causes or matters for any of the following purposes:

The administration of the estates of deceased persons.

The dissolution of partnerships, or the taking of partnership or other accounts.

The redemption or foreclosure of mortgages.

The raising of portions or other charges on land.

The sale and distribution of the proceeds of property subject to any lien or charge.

The execution of trusts, charitable or private.

The rectification or setting aside or cancellation of deeds or other written instruments.

The specific performance of contracts between vendors and purchasers of real estates, including contracts for leases.

The partition or sale of real estates.

The wardship of infants, and the care of infants' estates. (b)

All matters within the jurisdiction of the court under the



Conveyancing and Law of Property Act, 1881, (a) and the Settled Land Act, 1882, are assigned to this division. (b)

As before stated, one of the divisions of the Supreme Court is the Court of Appeal, which is a superior court of record, and is constituted as follows: The Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, and the President of the Probate, Divorce, and Admiralty Division (these are *ex-officio* judges), and five ordinary judges of appeal. (c)

Besides the ordinary judges of appeal, a judge of the Queen's Bench Division, and the Probate, Divorce, and Admiralty Division, may, on the written request of the Lord Chancellor, addressed to the president of the division, sit as an additional judge of the Court of Appeal. The judge who is to sit is chosen by his own division. During his attendance in the Court of Appeal he has all the jurisdiction and powers of a judge of the Court of Appeal, but he is not otherwise to be deemed to be a judge of that court. Nor can he sit as a judge on the hearing of an appeal from any judgment or order made by himself, or made by any divisional court of which he was a member and was present when the decision appealed against was given. (d)

Not less than three judges of the Court of Appeal sitting together can hear appeals from a final judgment or order, and not less than two judges so sitting can hear appeals from an interlocutory judgment or order. (e)

The jurisdiction and powers of the following courts are now transferred to and vested in the Court of Appeal:

(1.) All jurisdiction and powers of the Lord Chancellor and of the Court of Appeal in Chancery in the exercise of his and its appellate jurisdiction, and of the same court as a court of appeal in bankruptcy:

(a) 44 & 45 Vict. c. 41, s. 69.

(b) 45 & 46 Vict. c. 38, s. 46.

(c) 36 & 37 Vict. c. 66, s. 18;  
38 & 39 Vict. c. 77, s. 4; 39  
& 40 Vict. c. 59, s. 15; 44 & 45

Vict. c. 68, ss. 2, 3, 4; and Order  
in Council 16th December, 1880.

(d) 38 & 39 Vict. c. 77, s. 4; 44  
& 45 Vict. c. 68, s. 11.

(e) 38 & 39 Vict. c. 77, s. 12.

(2.) All jurisdiction and powers of the Court of Appeal in Chancery of the County Palatine of Lancaster, and of the Chancellor of the Duchy and County Palatine of Lancaster when sitting alone as a judge of re-hearing or appeal from the decrees or orders of the Court of Chancery of the County Palatine of Lancaster:

(3.) All jurisdiction and powers of the Court of the Lord Warden of the Stannaries, assisted by his assessors, and also of the Lord Warden when sitting in his capacity of judge:

(4.) All jurisdiction and powers of the Court of Exchequer Chamber: (a)

(5.) All jurisdiction vested in or exercised by the Queen in Council, or the Judicial Committee of the Privy Council upon appeals from the Court of Admiralty, or from any order in lunacy made by the Lord Chancellor, or by any other person having jurisdiction in lunacy. (b)

From the Court of Appeal a further appeal lies to the House of Lords, which is the court of final appeal for the United Kingdom. (c) The court itself practically consists of a few legal members of the House of Lords, lay peers never voting in any appeal to the House as a court of law, although theoretically they have the right to do so. (d)

No appeal can be heard and determined by the House of Lords unless there are present not less than three of the following lords of appeal:—(1) The Lord Chancellor; (2) the Lords of Appeal in ordinary; (3) such peers of Parliament as are for the time being holding or have held high judicial office; which includes those of Lord Chancellor of Great Britain or Ireland, paid judge of the Judicial Committee of the Privy Council, or of judge of one of Her

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(a) This court was the intermediate Court of Appeal from the Common Law Courts before the passing of the Judicature Acts.

(b) 36 & 37 Vict. c. 66, s. 18.

(c) 39 & 40 Vict. c. 59, s. 3.

(d) May's Parl. Pr. 370, 8th ed.

Majesty's superior courts of Great Britain, which are defined by the Act. (a)

In addition to the judges or judicial officers of the Supreme Court, there are certain administrative officers, the most important of whom are the following: The masters of the Supreme Court (b); the registrars and district registrars, the chief clerks (c); the examiners (d); the official referees (e) and the taxing masters. (f)

The duties performed by these officers respectively cannot conveniently be stated here, but will be found detailed in the ensuing pages.

## SECTION II.

### SITTINGS AND VACATIONS OF THE COURT.

The division of the legal year into terms is, by the Judicature Act, 1873, abolished. (g)

The Court of Appeal, and the High Court of Justice in London and Middlesex, now hold four sittings a year, namely, the Michaelmas sittings, which commence on the 24th of October and end on the 21st of December; the Hilary sittings, which commence on the 11th of January and end on the Wednesday before Easter; the Easter sittings, which commence on the Tuesday after Easter week and end on the Friday before Whit Sunday; and the Trinity sittings, which commence on the Tuesday after Whitsun week and end on the 12th of August. (h)

The days of commencement and termination of each sitting, &c., are included in such sitting. (i)

The offices of the Supreme Court are to be open every day

(a) 39 & 40 Vict. c. 59, ss. 5, 25.  
 (b) 42 & 43 Vict. c. 78, ss. 4-7;  
 Ord. 61, r. 3.  
 (c) Ord. 35; Ord. 55, r. 15.  
 (d) Ord. 38, r. 5, *et seq.*  
 (e) 36 & 37 Vict. c. 66, s. 83.

(f) 5 & 6 Vict. c. 103, s. 3.  
 (g) 36 & 37 Vict. c. 66, s. 26.  
 (h) Ord. 63, r. 1; Judg. Res.  
 Dec. 1883.  
 (i) Ord. 63, r. 5.

of the year except Sundays, Good Friday, Easter Eve, Monday and Tuesday in Easter week, Whit Monday, Christmas Day and the next following working day, and all days appointed by proclamation to be observed as days of general fast, humiliation, or thanksgiving. (a)

The office hours of the several offices (except the Summons and Order, Crown office, and Associates department) are from ten in the forenoon to four in the afternoon, except on Saturday and in vacation, when they close at two in the afternoon. In the excepted offices the hours are from eleven in the forenoon to five in the afternoon, except on Saturdays and in vacation, when they close at three in the afternoon. (b)

The offices of the district registrars are open on the days and hours on which the offices of the registrar of the County Court of the place in which the district registry is situate are open. (c) The office of the district registry at Manchester is not to be opened on the five days next following Whit Monday. (d)

There are four vacations in each year: the Long Vacation, commencing on the 13th of August and ending on the 23rd of October; the Christmas Vacation, commencing on the 24th of December and ending on the 6th of January; the Easter Vacation, commencing on Good Friday and ending on Easter Tuesday; and the Whitsun Vacation, commencing on the Saturday before Whit Sunday and terminating on the Tuesday after Whit Sunday. The days of commencement and termination of each vacation are included in such vacation. (e)

During each vacation two judges of the High Court, selected each year, sit in London or Middlesex to hear all applications that require to be immediately or promptly heard. (f)

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(a) Ord. 63, r. 6.  
(b) Ord. 63, r. 9.  
(c) Ord. 63, r. 7.  
(d) Ord. 63, r. 10.

(e) Ord. 63, rr. 4, 5; Judg. Res. Dec. 1883.  
(f) Ord. 63, r. 11.

The vacation judges may sit either separately or together as a divisional court as occasion may require, and may hear and dispose of all causes, matters, and other business to whichever division the same may be assigned. (a)

No pleadings can, however, be delivered in the Long Vacation unless directed by the court or judge. (b)

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(a) Ord. 63, r. 12; see also rr. 14-16.

(b) Ord. 64, r. 4.

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CHAPTER II.

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COMMENCEMENT OF PROCEEDINGS.

WE will now suppose that one person has a claim or cause of complaint against another, for (say) one of the causes or matters enumerated *ante*, p. 11, and wishes to enforce his claim or cause of complaint by due process of law. This he must do by action, which is now the general mode of instituting proceedings in the Chancery Division as well as in the other divisions of the High Court of Justice. The person who brings or institutes the action is called the plaintiff, and the person against whom it is brought the defendant. "Cause" includes an action or suit, and "suit" includes an action. (*a*)

## SECTION I.

## THE WRIT OF SUMMONS.

Every action in the High Court is a civil proceeding, and must be commenced by writ of summons, which must specify the division of the High Court to which the action is to be assigned (*b*); issued either out of the Central Office in London or out of a district registry. (*c*)

The writ of summons must be prepared by the plaintiff or his solicitor. (*d*) It must bear date on the day on which it is issued, and be tested in the name of the Lord Chancellor,

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<sup>1</sup> (*a*) Ord. 1, r. 1; 36 & 37 Vict. c. 66, s. 100.

(*b*) Ord. 2, r. 1; 36 & 37 Vict. c. 66, s. 100.

(*c*) Ord. 5, rr. 1, 2.

(*d*) Ord. 5, r. 10.

or, if that office is vacant, in the name of the Lord Chief Justice of England. (a)

The plaintiff can no longer mark the writ with the name of such judge as the plaintiff may, in his option, think fit; but it is the duty of the officer issuing the writ to mark it with the name of one of the judges of the Chancery Division, to whom for the time being chambers are attached; and then every subsequent writ, summons, or petition relating to the administration of the same trust, &c., or so connected therewith as to be conveniently dealt with by the same judge, must, whenever practicable, be marked by the proper officer with the name of such judge; and the party, or solicitor, presenting such writ, &c., must certify such relation or connection. (b)

If a writ is issued out of a district registry, and the defendant neither resides nor carries on business within the district, it must state on its face that he may appear either in the district registry or in London. But if the defendant does reside or carry on business in the district, the writ must state on its face that he must appear in the district registry. (c)

A writ for service out of the jurisdiction, or of which notice is to be given out of the jurisdiction, cannot be issued without leave of the court or a judge. (d)

The issuing of a writ of summons is not a "judicial act," relating back to the earliest hour of the day on which such writ is issued. (e)

Forms of writs of summons are given in the Appendix to the Rules of Court of 1883, and any costs occasioned by the use of any forms of writs other or more prolix than such forms, are to be borne by the party using the same, unless the court or a judge otherwise directs. (f)

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<p>(a) Ord. 2, r. 8.          (b) 36 &amp; 37 Vict. c. 66, s. 33;          Ord. 5, r. 9.          (c) Ord. 5, rr. 3, 4.</p>	<p>(d) Ord. 2, r. 4.          (e) <i>Clarke v. Bradlaugh</i>, 44 L. T. Rep. N. S. 779; 46 <i>ib.</i> 49.          (f) Ord. 2, r. 2.</p>
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The body of the writ contains the names of both plaintiff and defendant, and this will therefore be a convenient place to speak of parties to actions.

## SECTION II.

### PARTIES TO ACTIONS.

#### 1. AS PLAINTIFFS.

Every person may sue on his own behalf in equity with the exception of person under disability, who are infants, idiots, lunatics, and married women.

All persons may be joined as plaintiffs in whom any right to the relief claimed is alleged to exist, whether jointly, severally, or in the alternative; and judgment may be given for such of them as are found to be entitled to relief, without any amendment. But a defendant, though unsuccessful, is entitled to his costs occasioned by so joining persons who are not found entitled to relief, unless the court or a judge otherwise directs. (a)

Where there are numerous persons having the same interest in an action, one or more of such persons may sue on behalf or for the benefit of all persons so interested. (b) Thus the owner of a share in a ship may sue on behalf of himself and other owners for freight and dues for the use of the ship. (c)

Co-partners who were such at the time of the accruing of the cause of action may sue in the name of their firm. (d) But they, or their solicitor, must, on written demand by or on behalf of the defendant, declare in writing the names and addresses of all the co-partners, otherwise the action may be stayed. When the names of the partners are given the action proceeds as though each had been named as a plaintiff in the writ; but the proceedings still continue in the name

(a) Ord. 16, r. 1.

(b) Ord. 16, r. 9.

(c) *De Hart v. Stevenson*, 1 Q. B. Div. 313.

(d) Ord. 16, r. 14.



of the firm. (a) And any defendant may apply by summons for a statement of the names of the persons who were, at the time of the accruing of the cause of action, co-partners in such firm, to be furnished and verified on oath or otherwise as the judge may direct. (b)

Any person entitled to sue for partition may bring his action against any one or more of the other persons interested without making them all parties, but all persons who would formerly have been necessary parties must be served with notice of the decree, and are then bound thereby. The court may dispense with such service, and order advertisements to be published instead thereof. (c)

No objection for want of parties can be taken in the following cases: (d)

Any residuary legatee or next of kin entitled to a judgment or order for the administration of the personal estate of a deceased person may have the same without serving the remaining residuary legatees or next of kin. (e)

Any legatee interested in a legacy charged upon real estate, and any person interested in the proceeds of real estate directed to be sold, and who may be entitled to a judgment or order for the administration of the estate of a deceased person, may have the same without serving any other legatee or person interested in the proceeds of the estate. (f)

Any residuary devisee or heir entitled to the like judgment or order may have the same without serving any co-residuary devisee or co-heir. (g)

Any one of several *cestuis que trust* under any deed or instrument may, without serving any other of the *cestuis que trust*, have a judgment or order for the execution of the trusts of the deed or instrument, if entitled thereto. (h)

(a) Ord. 7, r. 2.

(b) Ord. 16, r. 14.

(c) 31 & 32 Vict. c. 40, s. 9; 39 & 40 Vict. c. 17, s. 3; Ord. 16, r. 40.

(d) See Ord. 16, r. 32 *et seq.*

(e) Ord. 16, r. 33.

(f) Ord. 16, r. 34.

(g) Ord. 16, r. 35.

(h) Ord. 16, r. 36.

In all cases of actions for the prevention of waste or otherwise for the protection of property, one person may sue on behalf of himself and of all persons having the same interest. (a)

Any executor, administrator, or trustee entitled thereto, may obtain a judgment or order against any one legatee, next of kin, or *cestui que trust* for the administration of the estate or the execution of the trusts. (b)

The court or a judge may require any other person to be made a party to the action or proceeding, and may give the conduct of the action or proceeding to such person as it may deem proper, and may make such order in any particular case as it may deem just for placing the defendant on the record on the same footing in regard to costs as other parties having a common interest with him in the matters in question. (c)

The court or a judge may direct that any persons interested in the estate, or under the trust, or in the hereditaments, and are not parties to the action, shall be served with notice of the judgment or order entitled in the action and duly indorsed; and after such notice they are bound by the proceedings in the same manner as if they had originally been made parties; and they are to be at liberty to attend the proceedings under the judgment or order upon merely entering an appearance in the Central Office in the usual manner. And the person served may, within one month after service, apply to the court or judge to discharge, vary, or add to the judgment or order. (d)

A memorandum of service of the judgment or order is to be entered at the Central Office upon proof by affidavit of such service. (e)

Trustees, executors, or administrators may sue on behalf of or as representing the property or estate of which they are

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(a) Ord. 16, r. 37.

(b) Ord. 16, r. 38.

(c) Ord. 16, r. 39.

(d) Ord. 16, rr. 40, 41, 43.

(e) Ord. 16, r. 42.

trustees or representatives, without joining any of the persons beneficially interested therein, and are to be considered as representing such persons; but the court or a judge may, at any stage of the proceedings, order any of such persons to be made parties, either in addition to or in lieu of the previously existing parties. (a)

It seems that the beneficiaries should not be made parties to the action. (b)

If, in any cause, matter, or other proceeding, it appears to the court or a judge that any deceased person who was interested in the matters in question has no legal personal representative, the court or judge may either proceed in the absence of such representative, or may appoint some person to represent the estate for all the purposes of the cause, matter, or other proceeding, on such notice to such persons, if any, as the court or judge shall think fit, either specially, or generally by public advertisement, and the order so made, and any order consequent thereon, binds such deceased person's estate, in the same manner as if a legal personal representative of the deceased had been a party to the cause, matter, or proceeding. (c)

In any cause or matter to carry into execution the trusts of a will it is not necessary to make the heir-at-law a party, unless the plaintiff wishes to establish the will against him. (d)

In any case where the right of an heir-at-law, next of kin, or a class, depends upon the construction which the court or a judge may put upon an instrument, and it is not known who is the heir-at-law, next of kin, or class, and the court or judge considers that it will be convenient to have the question of construction determined before the heir-at-law, next of kin, or class has been ascertained by inquiry, the court or judge may appoint some person to represent the

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(a) Ord. 16, r. 8.

(b) *Re Cooper*; *Cooper v. Vesey*,  
20 Ch. Div. 611; 47 L. T. Rep.  
N. S. 89; 51 L. J. 862, Ch.

(c) Ord. 16, r. 46.

(d) Ord. 16, r. 45.

heir-at-law, next of kin, or class, and the judgment of the court or judge in the presence of such person is binding on those he represents. (a)

Infants may sue as plaintiffs by their next friends. (b)

Where lunatics and persons of unsound mind not so found by inquisition might, before the Judicature Act, 1873, have sued as plaintiffs in any action or suit, they may now respectively do so by their committee or next friend, according to the practice of the Chancery Division. (c)

Lunatics so found sued by the committee of their estates, such committee first obtaining the sanction of the court having jurisdiction in lunacy. If the lunatic had no committee he sued by his next friend. As a general rule the lunatic must be named as a co-plaintiff. (d)

Before the name of any person can be used in any action as next friend of any infant or other party, or as relator, such person must sign a written authority to the solicitor for that purpose, which must be filed in the Central Office, or in the district registry if the cause or matter is proceeding therein. (e)

Formerly, a married woman usually sued jointly with her husband, unless his interests were adverse to hers, in which case she sued by her next friend. (f) Now she may sue as provided by the Married Women's Property Act, 1882 (g), that is, as a *feme sole*, and the previous leave of the court or a judge is no longer requisite. (h) And even before this Act, under the Divorce and Matrimonial Causes Acts, a married woman could sue as a *feme sole* if judicially separated from her husband; so if she obtains a protection order she may sue as a *feme sole*. (i) And by the Married Women's Property Act (45 & 46 Vict. c. 75, s. 1), a married woman

(a) Ord. 16, r. 32.

(b) Ord. 16, r. 16.

(c) Ord. 16, r. 17.

(d) 1 Alph. Pr. 576.

(e) Ord. 16, r. 20.

(f) Gold. Eq. Pr. 208, 209, 4th ed.

(g) Ord. 16, r. 16.

(h) *James v. Barraud*, 49 L. T. Rep. N. S. 300.

(i) 20 & 21 Vict. c. 85, ss. 21, 26; 41 Vict. c. 19, s. 4.

may, in accordance with the provisions of the Act, acquire, hold, and dispose of any real or personal property as her separate property, as if she were a *feme sole*. And she is capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing in all respects as if she were a *feme sole*, without the husband being joined with her as plaintiff, &c., and any damages or costs recovered by her in the action or proceeding is to be her separate property. And her contracts are to be deemed to be contracts entered into by her with respect to and to bind her separate property, unless the contrary be shown. And by sect. 12, every woman, whether married before or after this Act, is to have in her own name against all persons, including her husband, the same civil remedies for the protection and security of her separate property as if it belonged to her as a *feme sole*, but (except as aforesaid) no husband or wife is to be entitled to sue the other for a tort. And in any proceeding under this section it is sufficient to allege such property to be her separate property. And by sect. 18 a married woman who is executrix or administratrix alone or jointly with any other person of a deceased person's estate, or a trustee alone or jointly of trust property, may sue, &c., in that character, without her husband, as if she were a *feme sole*.

Under this Act a married woman may sue in her own name without giving security for costs. (a)

A person may be admitted to sue as a pauper on proof that he is not worth 25*l.*, his wearing apparel and the subject-matter of the cause or matter only excepted. He must first, however, lay a case before counsel, and obtain his opinion that the pauper has reasonable grounds for proceeding. The pauper or his solicitor must make an affidavit that the case contains a full and true statement of all the material facts to the best of his knowledge and belief, and the opinion and

(a) *Severance v. Civil Service Supply Association*, 48 L. T. Rep. | N. S. 485; *Threlfall v. Wilson*, L. Rep. 8 Prob. Div. 18.

affidavit must be produced before the court, judge, or officer to whom the application is made. No fees are payable by a person admitted to sue as a pauper to his counsel or solicitor; nor is he liable to any court fees. And any person who takes, or agrees to take, any fee or reward from the pauper for the conduct of business in court, is guilty of a contempt of court, and the pauper giving or agreeing to give such fee or reward is to be forthwith dispaupered. (a)

Notices of motion, summonses, and petitions, on the pauper's behalf, must be signed by his solicitor, otherwise they cannot be served, issued, or presented. (b)

In the case of a married woman, or an infant, it has hitherto been the practice to further state in the affidavit her or his inability to procure any substantial person to act as next friend. (c) But, as before stated, a married woman may now sue as a *feme sole*.

The order, when obtained, must be entered at the Central Office and served without delay. (d)

When the rights of the Queen, or of those who partake of her prerogative, are the subject of an action, the name of the Attorney-General, or, if that office is vacant, of the Solicitor-General, is used as plaintiff, or *dominus litis*. The Attorney-General is also properly plaintiff in actions in support of the rights of those whose protection devolves upon the Crown as supreme head of the Church, and on behalf of individuals under the protection of the Crown as *parens patriæ*, as the objects of general charities (e); but not of private charities. (f)

If the action immediately concerns the rights of the Crown the officers proceed upon their own authority, without the intervention of anyone; but where the rights are not immediately concerned, some person must be added as a relator (g)

(a) Ord. 16, rr. 22-29.

(b) Ord. 16, r. 29.

(c) 1 Alph. Pr. 579.

(d) 1 Alph. Pr. 579.

(e) 1 Alph. Pr. 580; Sm. Pr. 268, 7th ed.

(f) Gold. Eq. 223, 4th ed.

(g) 1 Alph. Pr. 580.

who must sign a written authority to the solicitor for that purpose, to be filed when the writ is issued. (a)

A queen consort, when there is one, sues by her Attorney or Solicitor-General. (b)

The Prince of Wales, when of full age, sues by his Attorney-General in all matters relating to the Duchy of Cornwall, of which he is Duke. If he is not of full age the Queen's Attorney-General joins with the Attorney-General of the Prince in suing. (c)

A foreign Government may sue in respect of its private rights, by the name by which it or its sovereign has been recognised by the Government of this country; and is not bound to sue in the name of any officer of the Government, or to join any such officer as co-plaintiff. (d)

The property of a bankrupt forthwith passes to and vests in the trustee on his appointment; and the trustee may, with the permission of the committee of inspection, bring, institute, or defend any action or other legal proceeding relating to the property of the bankrupt, and employ a solicitor for such purpose. (e)

No action is to be defeated by reason of the misjoinder or non-joinder of parties, and the court may deal with the matter in controversy so far as regards the interests and rights of the parties actually before it; and the court or a judge may order any parties improperly joined to be struck out, or any necessary parties to be added. (f)

## 2. AS DEFENDANTS.

All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative, and judgment may be given against such of them as are liable without any amendment. (g)

(a) Ord. 16, r. 20.

(b) 1 Alph. Pr. 581.

(c) 1 Alph. Pr. 581.

(d) 1 Alph. Pr. 581.

(e) 46 & 47 Vict. c. 51, ss. 54, 57;

and see *Jameson and Co. v. Brick and Stone Company*, 39 L. T. Rep. N. S. 594.

(f) Ord. 16, r. 11.

(g) Ord. 16, r. 4.

It is not necessary that every defendant to an action be interested as to all the relief prayed for, or as to every cause of action included therein; but the court or a judge may make such order as may appear just to prevent any defendant from being embarrassed, or put to expense by being required to attend any proceedings in which he may have no interest. (a)

In an action on a contract the plaintiff may, at his option, join as parties all or any of the persons severally, or jointly and severally, liable thereon. And if the plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants, in order that the question as to which, if any, of them is liable, and to what extent, may be determined as between all parties. (b)

These rules deal with cases in which there are many persons interested and many interests involved, and give the court power, once for all, to dispose of these cases and all the interests. (c)

The alternative relief claimed against one defendant need not be consistent with that prayed against another defendant. Nor is the plaintiff at the hearing bound to elect against which defendant to proceed; and one defendant may support the plaintiff's case against the other. The defendant who is the cause of the whole litigation must pay the costs of the plaintiff and the other defendants. (d)

No action can, as before shown, be defeated by reason of misjoinder or non-joinder of parties, and parties may be struck out or added by the court or a judge. (e)

Trustees, executors, and administrators may be sued on behalf of or as representing the trust property or estate, without joining the persons beneficially interested therein; but the court or a judge may, at any stage of the proceedings,

(a) Ord. 16, r. 5.

(b) Ord. 16, rr. 6, 7.

(c) *Cox v. Barker*, L. R. 3 Ch. Div. 359; 35 L. T. Rep. N. S. 687.

(d) 1 Alph. Pr. 582.

(e) Ord. 16, r. 11; and see *Werdermann v. Société Générale D'Electricité*, 45 L. T. Rep. N. S. 514.



order any of such beneficiaries to be made parties, either in addition to, or in lieu of, the previously existing parties. (a)

One or more of numerous persons having the same interest in one cause or matter may be sued, or may be authorised by the court or a judge to defend such cause or matter on behalf of, or for the benefit of, all the parties so interested. (b)

And if a person who was interested in the matter in question in any cause, matter, or proceeding, has died without leaving a legal personal representative, the court may either proceed in the absence of such representative, or appoint some person to represent the estate for all the purposes of the cause or matter or proceeding. (c)

As to legatees, next of kin, devisees, heirs, *cestuis que trust*, &c., suing, or as to appointing a person to represent heirs-at-law or next of kin, or a class; or making an heir-at-law a party to execute the trusts of a will, see *ante*, pp. 20, 22.

Partners, who were such at the time of the accruing of the cause of action, may be sued in the name of the firm; and where one person has carried on business in the name of a firm apparently consisting of more than one person, he may be sued in the name of the firm. And where partners are sued in the name of their firm, the plaintiff may, by summons at chambers, obtain an order for a statement of the names of the co-partners, to be verified on oath or otherwise as the judge may direct. (d) But if the partnership has been dissolved to the knowledge of the plaintiff before the commencement of the action, the writ must be served on every person sought to be made liable. (e)

And when a writ is issued against partners in the name of the firm, and no application is made under Order XVI., r. 14, the judgment must be in accordance with the writ, and

(a) Ord. 16, r. 8; *et ante*, p. 21.  
 (b) Ord. 16, r. 9; and see *Fraser v. Cooper, Hall, and Co.*, 21 Ch. Div. 718; 46 L. T. Rep. N. S. 371; 51 L. J. 575, Ch.; 30 W. R. 654.

(c) See fully *ante*, p. 22.  
 (d) Ord. 16, rr. 14, 15.  
 (e) Ord. 16, r. 14.

must be against the firm; and individual judgment cannot be entered against one of the partners who has failed to appear. (a) But the plaintiff may bring an action on the judgment against individual members of the firm. (b)

Formerly a married woman usually defended jointly with her husband. (c) However, by an order of the court or judge, she might have defended without her husband or a next friend, on giving such security, if any, for costs as the court or judge by order required. (d) A married woman may be sued alone when her husband is an exile, or has abjured the realm. (e) Also where she is judicially separated from her husband, or has obtained a protection order under the Divorce and Matrimonial Causes Acts. (f) And now, by Order XVI., r. 16, a married woman may be sued as provided by the Married Women's Property Act, 1882.

By this Act (45 & 46 Vict. c. 75), s. 1, a married woman may, in accordance with the provisions of this Act, acquire, hold, and dispose of any real or personal property as her separate property in the same manner as if she were a *feme sole* (sub-sect. 1). She is also to be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of being sued either in contract or tort or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as a defendant, or be made a party to any action or other legal proceeding brought against her, and any damages or costs recovered against her in any such action or proceeding is to be payable out of her separate property, and not otherwise (sub-sect. 2). And every contract entered

(a) *Jackson v. Litchfield*, 8 Q. B. Div. 474; 46 L. T. Rep. N. S. 518; *Munster v. Railton*, 11 Q. B. Div. 435; 31 W. R. 880; 48 L. T. Rep. N. S. 624.

(b) *Clarke v. Cullen*, 9 Q. B. Div. 355.

(c) *Ayk. Pr.* 598, 9th edit.;

*Hancocks v. Lablach*, 47 L. J. 514, C. P.; 3 C. P. Div. 197; 26 W. R. 402.

(d) *Brown v. North*, 9 Q. B. Div. 52; 51 L. J. 365, Q. B.; 30 W. R. 531; 46 L. T. Rep. N. S. 361.

(e) 1 *Alph. Pr.* 584.

(f) 20 & 21 Vict. c. 85, ss. 21, 26; 41 Vict. c. 19, s. 4.

into by a married woman is to be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown (sub-sect. 3).

By sect. 13 a woman after marriage continues liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into or wrongs committed by her before marriage, including her liability as a contributory under the Joint Stock Companies Acts; and she may be sued for such debt or liability, and all sums recovered against her in respect thereof, or for costs relating thereto, are to be payable out of her separate property, which, as between her and her husband, unless there be a contract between them to the contrary, is to be primarily liable thereto. But nothing in this Act is to operate to increase or diminish the liability of a woman married *before* the commencement of this Act (1st January, 1883) for any such debt, contract, &c., except as to any separate property to which she may become entitled by virtue of this Act, and to which she would not have been entitled for her separate use if this Act had not passed.

By sect. 14 a husband is to be liable for his wife's debts and contracts entered into, and for wrongs committed, by her before marriage, including her liability as a contributory as aforesaid, to the extent of all property whatsoever belonging to her which he acquires or becomes entitled to from or through her, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bonâ fide* recovered against him in respect of such debts, contracts, or wrongs, but he is not to be liable for the same further or otherwise. And an inquiry may be directed by the court for the purpose of ascertaining the nature, amount, or value of such property. But this Act is not to operate to increase or diminish the liability of any husband married *before* the commencement of the Act for or in respect of any such debt or other liability of his wife as aforesaid.

By sect. 15 a husband and wife may be jointly sued in respect

of any such debt or liability contracted or incurred by the wife before marriage as above stated, if the plaintiff seeks to establish his claim either wholly or in part against both of them ; and if in any such action, or in an action for any such debt or liability against the husband alone, it is not found that he is liable in respect of any property of the wife so acquired by him, or to which he has become entitled as aforesaid, he is to have judgment for his costs of defence, whatever may be the result of the action against the wife if jointly sued with him ; and in any such action against husband and wife jointly, if it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable is to be a joint judgment against the husband personally and against the wife as to her separate property ; and as to the residue, if any, of such debt and damages, the judgment is to be a separate judgment against the wife as to her separate property only.

By sect. 18 a married woman who is an executrix or administratrix alone or jointly with any other person of a deceased person's estate, or a trustee alone or jointly as aforesaid of property subject to any trust, may be sued in that character without her husband, as if she were a *feme sole*.

Sect. 19 contains a saving clause as to marriage settlements, but enacts that no restriction against anticipation in a settlement, &c., of a woman's own property to be made or entered into by herself is to have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement is to have any greater force or validity against creditors of such woman than a like settlement, &c., entered into by a man would have against his creditors.

By sect. 23, for the purposes of this Act, the legal personal representative of a married woman is in respect of her separate estate to have the same rights and liabilities and be subject to the same jurisdiction as she would if she were living ; and

by sect. 24 the provisions of the Act as to her liability are to extend to liabilities by reason of a breach of trust or *devastavit* committed by a married woman, being a trustee or executrix or administratrix, either before or after marriage, and her husband is not to be liable unless he has acted or intermeddled in the trust or administration.

An infant must defend an action by guardian *ad litem*. No order for the appointment of such guardian is now necessary; but the solicitor applying to enter the appearance must make and file an affidavit that the person named is a fit and proper person to act as guardian *ad litem* for the infant, and has no interest in the matters in question in the action adverse to that of the infant. (a)

Order XVI., r. 20, provides that, before the name of any person is used in an action as *next friend* of any infant, such person must sign a written authority to the solicitor for that purpose, which is to be filed in the Central Office, or in the district registry if the action is proceeding therein. And, from the wording of the form of affidavit given to rule 18 of Order XVI. (stated *supra*), the guardian *ad litem* must also sign a consent to act as such, which is to be annexed to the affidavit filed. (b)

The guardian is responsible for the propriety and conduct of the defence, and may be removed if he makes default therein, or for any other good cause. (c)

Where lunatics and persons of unsound mind not so found by inquisition might, before the passing of the Judicature Act, 1873, have been sued as defendants in any action or suit, they may respectively defend any action by their committees or guardians appointed for that purpose according to the practice of the Chancery Division. (d)

A lunatic so found by inquisition defends, according to the practice of the court, by the committee of his estate, who is

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(a) Ord. 16, r. 18; Appendix A., pt. 2, No. 8.  
(b) See Appendix A., pt. 2, No. 8.

(c) 1 Alph. Pr. 588.  
(d) Ord. 16, r. 17.

made a co-defendant with the lunatic. The committee must obtain the sanction of the lunacy jurisdiction before defending. If the lunatic has no committee, or the committee is plaintiff, a guardian should be appointed by order obtained on motion or petition of course. (a)

Lunatics not so found by inquisition defend by guardian *ad litem*. (b) An order is necessary for the appointment of the guardian.

Where no appearance has been entered to a writ of summons for a defendant who is an infant or a person of unsound mind, not so found by inquisition, the plaintiff must, before further proceeding with the action, apply to the court or a judge for an order that some proper person be assigned guardian of such defendant, by whom he may appear and defend the action. The order is not to be made unless it appears on the hearing of the application that the writ of summons was duly served, and that notice of such application was, after the expiration of the time allowed for appearing, and at least six clear days before the day named in the notice for hearing the application, served upon or left at the dwelling-house of the person with whom or under whose care such defendant was at the time of serving the writ; and, if the defendant, being an infant, is not residing with or under the care of his father or guardian, also served upon or left at the dwelling-house of the father or guardian of the infant, unless the last-mentioned service is dispensed with by the court or a judge. (c)

A person may be admitted to defend as a pauper on an order being obtained for that purpose, as on an admission to sue as a pauper, except that no case for the opinion of counsel is required. (d)

Where the rights of the Crown are immediately in question, or where any title is vested in the Crown, which

(a) 1 Alph. Pr. 587.

(b) Gold. Eq. Pr. 210, 4th ed.

(c) Ord. 13, r. 1.

(d) 1 Alph. Pr. 590; Ord. 16, rr. 22, 25-29; *et ante*, p. 24.

the action seeks to divert, the party must apply to the Queen by petition of right, and not institute proceedings by writ of summons. In some cases the Attorney-General represents the Crown as defendant, as where the subject-matter is wholly or in part money appropriated to general charitable purposes, where there is no established charitable institution, or it is not of a permanent nature.(a)

A queen consort (if one) is sued by her Attorney or Solicitor-General in the same manner as a king or queen regnant. (b)

The Prince of Wales, as Duke of Cornwall, should, it appears, be sued by his Attorney-General. (c)

A foreign sovereign prince, or foreign Government, is exempt from all liability of being sued in the courts of this country for acts done in such character. But if a foreign sovereign sues in an English court, then a cross-action for discovery may be commenced against such sovereign or Government, and the action of the foreign Government may be stayed until security for costs has been given. (d)

### 3. SUBSTITUTING, ADDING, AND STRIKING OUT PARTIES.

Where an action has been commenced in the name of a wrong person as plaintiff, or it is doubtful whether it has been commenced in the name of the right plaintiff, the court or a judge may, if satisfied that the mistake was made *bonâ fide*, and that it is necessary to the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as may be just.(e)

The order may be made whether the mistake be one of law or fact. (f)

As before stated, no action can be defeated for misjoinder

(a) 1 Alph. Pr. 590.  
 (b) 1 Alph. Pr. 590.  
 (c) 1 Dan. Pr. 159, 6th edit. ; 1 Alph. Pr. 590.  
 (d) 1 Alph. Pr. 590, 591.  
 (e) Ord. 16, r. 2.

(f) *Duckett v. Gover*, 6 Ch. Div. 8; 46 L. J. 407, Ch. ; *Val de Travers Paving Company v. London Tramways Company*, 40 L. T. Rep. N. S. 133 ; 48 L. J. 312, C. P.

or non-joinder of parties; and the court or a judge may, at any stage of the proceedings, either upon or without the application of either party, and on such terms as may be just, order that the names of any parties improperly joined, whether as plaintiffs or defendants be struck out; and that the names of any parties, whether as plaintiffs or defendants, who ought to have been joined, or whose presence is necessary for the complete settlement of all the questions involved in the cause or matter, be added. No person can, however, be added as plaintiff either suing without a next friend, or as the next friend of a plaintiff, except by his own written consent. (a)

Applications to add, strike out, or substitute a plaintiff or defendant may be made before trial by motion to the court, or by summons at chambers, or at the trial summarily. (b)

Where a defendant is substituted or added, the plaintiff must, unless otherwise ordered, file an amended copy of, and sue out a writ of summons, and serve the new defendant with such writ, or with a notice in lieu thereof, in the same manner as an original defendant is served. (c)

A party cannot be joined as a defendant in an action after final judgment. (d)

### SECTION III.

#### 1. INDORSEMENTS ON THE WRIT.

Before the writ is issued it must be indorsed with a statement of the nature of the claim made, or of the relief or remedy required in the action. (e) But it is not necessary to set forth the precise ground of complaint, or the precise remedy or relief to which the plaintiff considers himself entitled. (f)

If the plaintiff sues, or the defendant (or any of them) is

(a) Ord. 16, r. 11.

(b) Ord. 16, r. 12.

(c) Ord. 16, r. 13.

(d) *Heard v. Borgwardt*, W. N., 1883, p. 173.

(e) Ord. 2, r. 1; Ord. 3, r. 1.

(f) Ord. 3, r. 2.



sued, in a representative capacity, the indorsement on the writ must show in what capacity the plaintiff sues or the defendant is sued. (a)

An indorsement on a writ is not a "pleading" so as to entitle a plaintiff without the consent of the defendant to move thereon for an order on admissions in the pleadings under Order XXXII., r. 6, in a case where the defendant, admitting the plaintiff's claim, has given notice that he does not require the plaintiff to deliver a statement of claim. (b)

Forms of indorsements are given in part 3 of Appendix A. to the Rules of Court, 1883; and if these forms are not followed, and increased cost is occasioned thereby, it must be borne by the party making the indorsement unless otherwise ordered by the court or a judge. (c)

Amongst the forms of indorsements given in the Appendix to the Rules of Court, 1883, is that for an account; as in an action to wind-up a partnership; or to obtain the foreclosure or redemption of a mortgage. In these, and in all cases in which the plaintiff, in the first instance, desires to have an account taken, the writ of summons must be indorsed with a claim that such account be taken. (d)

In actions to recover a debt or liquidated demand in money payable by the defendant (a class of actions usually and properly brought in the Queen's Bench Division), the plaintiff may specially indorse his writ of summons with a statement of his claim, or of the remedy or relief to which he claims to be entitled. And when this is done, even if the defendant appears to the writ, the plaintiff may apply (in the mode to be pointed out hereafter) for leave to enter final judgment for the amount indorsed, &c. As the amount claimed may arise on a trust, this would bring the action within the class of

(a) Ord. 3, r. 4.

(b) *Wallis v. Jackson*, 23 Ch. Div. 204; 52 L. J. 384, Ch.; 31 W. R. 519.

(c) Ord. 2, r. 2; Ord. 3, r. 3.

(d) See Ord. 3, r. 8; Appendix A., pt. 3, sect. 1.

actions assigned to the Chancery Division; and the writ of summons may also be specially indorsed in an action for the recovery of land, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired, or been determined by notice to quit, or against persons claiming under such tenant. (a)

After the indorsement of the nature of the claim, there follows, when the writ is issued out of the Central Office, an indorsement stating the address of the plaintiff, and the name and place of business of the solicitor, and if the place of business of the solicitor is more than three miles from the principal entrance of the Central Hall at the Royal Courts of Justice, also with an address not more than three miles from that locality where the several writs, notices, summonses, orders, proceedings, and communications may be left for him, called an address of service. And if such solicitor is agent for another solicitor, the name and place of business of the latter must be added. (b)

If the plaintiff sues a writ out of the Central Office in person, he must indorse the writ and notice in lieu of service of a writ with his place of residence and occupation, and if his residence is more than three miles from the principal entrance of the Central Hall at the Royal Courts of Justice, also with an address for service not more than three miles from that locality. (c)

If the writ be issued out of a district registry, the solicitor must indorse on the writ and notice in lieu of service of a writ, the address of the plaintiff and his own name and business address, which will be sufficient if he carries on business within the district; but otherwise he must add an address for service within the district. And if the solicitor is agent for another solicitor, the name and place of business of the latter must be added. And if the defendant does not reside within the district, an address for service not more than

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(a) Ord. 3, r. 6; Ord. 14, r. 1.

(b) Ord. 4, r. 1.

(c) Ord. 4, r. 2.

three miles from the principal entrance of the Central Hall at the Royal Courts of Justice must be added. (a)

If the plaintiff in person issues a writ out of a district registry, he must indorse it and the notice in lieu of service of a writ with his place of residence and occupation, which will be the address for service if he resides within the district; but if otherwise, he must give an address for service within the district. And if the defendant does not reside within the district, an address for service not more than three miles from the principal entrance of the Central Hall at the Royal Courts of Justice must be added. (b)

After the writ is served that fact must be duly indorsed on the writ. (c)

## 2. JOINDER OF CAUSES OF ACTION.

Several causes of action by the same plaintiff against the same defendant may be joined without leave, and claims by plaintiffs jointly may be joined with claims by them, or any of them, separately against the same defendant. But if it appears to the court or a judge that any such causes of action cannot be conveniently tried together, separate trials may be ordered, or any cause of action may be ordered to be excluded. (d)

No action, however, for the recovery of land can, without leave of the court or a judge, be joined to any other cause of action, except claims for mesne profits, or arrears of rent, or double value in respect of the premises claimed, and damages for breach of any contract under which the same are held, or for any wrong or injury to the premises claimed. (e)

A claim for an injunction may be joined with a claim for quiet possession of the same land. (f)

(a) Ord. 4, r. 3.

(b) Ord. 4, r. 3.

(c) Ord. 9, r. 15; and see *Sproat v. Peckett*, 48 L. T. Rep. N. S. 755.

(d) Ord. 18, rr. 1, 6, 9.

(e) Ord. 18, r. 2.

(f) *Kendrick v. Roberts*, 46 L. T. Rep. N. S. 59; 30 W. R. 365.

Claims by a trustee in bankruptcy, as such, cannot, except by leave of the court or a judge, be joined with any claim by him in any other capacity. (a)

Claims by or against husband and wife may be joined with claims by or against either of them separately. (b)

Claims by or against an executor or administrator, as such, may be joined with claims by or against him personally, provided the latter arise with reference to the estate which the executor or administrator represents as such. (c)

As before stated, where several causes of action are joined (under the above rules) which cannot conveniently be tried or disposed of together, the court or a judge may, at any time, on application by the defendant, order any of such causes to be excluded, or order separate trials, or make such other order as may be necessary or expedient for the separate disposal thereof, and may order consequential amendments to be made, and may make such order as to costs as may be just. (d)

On the other hand, the court or a judge may order actions to be consolidated. (e) Thus, when two or more actions are brought by the same plaintiff against the same defendant for what is substantially the same cause of action, or for causes of action that might have been conveniently joined in one action, if the double proceedings be vexatious or oppressive, the order may be made; or if the actions are against different defendants, where the questions in issue are substantially the same. The application may be made by motion or summons, but by the defendant only, as a general rule. (f)

But where a plaintiff is suing in this country and also abroad in respect of the same matter, and a motion is made to compel the plaintiff to elect which proceeding he will continue, it is not sufficient for the person moving to show that the two proceedings are being taken with reference to

(a) Ord. 18, r. 3.

(b) Ord. 18, r. 4.

(c) Ord. 18, r. 5; *Johnson v. Burgess*, 47 L. J. 552, Ch.

(d) Ord. 18, rr. 1, 7, 8, 9.

(e) Ord. 49, r. 8.

(f) 1 Alph. Pr. 195.

the same matter; he must go further, and show that there is vexation in point of fact—that is, that there is no necessity for harassing the defendant by double litigation. (a)

### 3. ISSUE AND SERVICE OF THE WRIT.

The plaintiff or his solicitor, having duly prepared the writ of summons, proceeds to issue it—that is, to present it to be sealed by the proper officer; and when this is done the writ is deemed to be issued. (b)

The plaintiff in any action may, at the time of or at any time during twelve months after the issuing of the original writ of summons, issue one or more concurrent writ or writs to bear test on the same day as the original writ, and be sealed as a concurrent writ or writs, which are, however, only in force for the same time as the original writ; and a writ for service out of the jurisdiction, or of notice in lieu of service, may be issued concurrently with one for service within the jurisdiction, and *vice versa*. (c)

On presenting a writ for sealing, the plaintiff or his solicitor must leave with the officer a copy thereof with all the indorsements thereon, signed by or for the solicitor, or by the plaintiff himself if he sues in person (d), which will be filed by the officer, and an entry thereof made in the cause book and duly distinguished. (e)

As before shown, the writ may issue out of a district registry, no matter where the plaintiff resides, or out of the Central Office in London. (f)

However, as will be shown fully hereafter, no writ of summons for service out of the jurisdiction, or of which notice is to be given out of the jurisdiction, can be issued without leave of the court or a judge. (g)

(a) *McHenry v. Lewis*, 22 Ch. Div. 397; 52 L. J. 325, Ch.; 47 L. T. Rep. N. S. 549; 31 W. R. 305, C. A.; *Peruvian Guano Company v. Bockwoldt*, 23 Ch. Div. 225; 31 W. R. 851; 52 L. J. Ch. 714; 48 L. T. Rep. N. S. 7.

(b) Ord. 5, r. 11.

(c) Ord. 6, rr. 1, 2.

(d) Ord. 5, r. 12.

(e) Ord. 5, r. 13.

(f) Ord. 5, rr. 1, 2.

(g) Ord. 2, r. 4; Ord. 11, r. 1.

Every action is distinguished by the date of the year, and a letter and a number ; and if the action is commenced in a district registry, it is further distinguished by the name of such registry. (a)

Notice to the proper officer of the assignment of an action to any division of the court is sufficiently given by leaving with him the copy of the writ of summons. (b)

The writ having been duly issued, must next be served, and, where practicable, the service must be personal, unless the court or a judge, for good cause, makes an order for substituted or other service. (c) No service, however, is necessary when the defendant by his solicitor undertakes in writing to accept service, and enters an appearance. (d)

Service is effected by delivering a copy of the writ, and at the same time showing the original. Service may be effected at any hour of the day or night, and on any day except Sunday, so long as the writ is in force. (e)

Where husband and wife are both defendants to the action they must both be served, unless the court or a judge otherwise order. (f)

When an infant is defendant in an action, service on the father or guardian, or, if none, on the person with whom the infant resides, or under whose care he is, is good service on the infant, unless the court or a judge otherwise order. (g)

When a lunatic is a defendant, service upon his committee is good service on the lunatic; but if not so found by inquisition, service upon the person with whom the person of unsound mind resides, or under whose care he is, is good service upon him, unless in either case the court or judge otherwise order. (h)

(a) Ord. 5, r. 13.

(b) Ord. 5, r. 14.

(c) See Ord. 9, r. 2 ; as to substituted service, see *Coulbourne v. Corshaw*, 32 W. R. 32, *et post*.

(d) Ord. 9, r. 1.

(e) *Lush's Pr.* by Step. 356.

(f) Ord. 9, r. 3.

(g) Ord. 9, r. 4.

(h) Ord. 9, r. 5 ; *The Fore-street Warehouse Company v. Durrant and Co.*, L. Rep. 10 Q. B. Div. 471 ; 52 L. J. 287, Q. B. ; 48 L. T. Rep. N. S. 531 ; 31 W. R. 765.

Where persons are sued as partners in the name of the firm the writ is to be served either upon any one or more of them, or at the principal place within the jurisdiction of the business of the partnership upon the person having at the time of service the control or management of the partnership business there. So if one person carries on business in the name of a firm apparently consisting of more than one person, and he is sued in the name of the firm, the writ may be served at the principal place of business upon the person who has at the time of service the control or management of the business there. (a)

In the absence of any statutory provision regulating service of process, every writ of summons issued against a corporation aggregate may be served on the mayor or other head officer, or on the town clerk, treasurer, or secretary thereof; and every writ of summons issued against the inhabitants of a hundred, or other like district, may be served on the high constable thereof; or, if there be no high constable, then on any other acting chief officer of police of the county in which such hundred or district is situate; and if the writ is issued against the inhabitants of a county, city, or town, &c., not part of a hundred or other like district, it may be served on some peace officer thereof. And where a statute provides for the service of a writ, &c., upon a corporation or society, the writ may be served as so provided. (b)

By the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 62, service upon a company registered under this Act may be effected by leaving the copy writ of summons or sending it through the post in a prepaid letter addressed to the company at their registered office.

A railway company may, by the 8 & 9 Vict. c. 16, s. 135, and c. 20, s. 138, be served by a copy of the writ of summons being sent by post to one of the principal offices of the company, or by being delivered personally to the secretary,

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(a) Ord. 9, rr. 6, 7.

| (b) Ord. 9, r. 8.

or, if there is no secretary, then by being given to a director of the company.

Where a defendant is added or substituted (see *ante*, p. 34), the plaintiff must, unless otherwise ordered by the court or a judge, file an amended copy of and sue out a writ of summons, and serve the new defendant with such writ or notice in lieu of service thereof in the same manner as an original defendant is served. (a)

As before stated, a writ of summons may, by leave of the court or a judge, be issued for service out of the jurisdiction of the court.

Service of a writ of summons out of the jurisdiction, or notice of a writ of summons, may by order be allowed in the following cases : (b)—

(1.) Whenever the whole subject-matter of the action is land situate within the jurisdiction, with or without rents or profits; or

(2.) Whenever any act, deed, will, contract, &c., affecting land or hereditaments within the jurisdiction is sought to be construed, rectified, set aside, or enforced in the action; or

(3.) When any relief is sought against a person domiciled or ordinarily resident within the jurisdiction; or

(4.) When the action is for the administration of the personal estate of a deceased person who at the time of his death was domiciled within the jurisdiction, or is for the execution of the trusts of any written instrument as to property within the jurisdiction, of which the person to be served is a trustee, and which ought to be executed according to the law of England; or

(5.) When the action is founded on any breach or alleged breach within the jurisdiction of a contract wherever made, which, according to its terms, ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland; or

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(a) Ord. 16, r. 13.

| (b) Ord. 11, r. 1.



(6.) When an injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought in respect thereof; or

(7.) When any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction. (a)

The application must be supported by evidence by affidavit or otherwise stating that, in the belief of the deponent, the plaintiff has a good cause of action, (b) showing in what place or country the defendant is or may probably be found, and whether he is a British subject or not, and the grounds on which the application is made. (c)

If the defendant moves to discharge the order giving leave to serve the writ, which he may do before appearance, (d) affidavits are admissible to contest the question whether the cause of action arose within the jurisdiction. (e)

When leave is asked to serve a writ under Order XI, r. 1, on a defendant resident in Scotland or Ireland, the court or judge is to have regard to the existence of any court there having concurrent jurisdiction in the matter in question, and to the comparative cost and convenience of proceeding in England or in the defendant's place of residence. (f)

The order giving leave to effect service, or to give notice in lieu of service, is to limit a time after such service or notice within which the defendant is to appear; the time depending on the place where the defendant is. (g)

Where the defendant is neither a British subject nor in British dominions, notice of the writ, and not the writ itself, is to be served upon him. (h)

(a) This means territorial jurisdiction: (*Re the City of Mecca; Re Smith*, 45 L. J. 92, Adm.)

(b) The cause of action must arise within the jurisdiction: (*Shearman v. Findlay*, 32 W. R. 122.)

(c) Ord. 11, r. 4.

(d) Ord. 12, r. 30.

(e) *Fowler v. Barstow*, 20 Ch. Div. 240, C. A.; 51 L. J. 103, Ch.; 45 L. T. Rep. N.S. 603; 30 W. R. 112.

(f) Ord. 11, r. 2.

(g) Ord. 11, r. 5.

(h) Ord. 11, r. 6.

Notice in lieu of service is to be given in the manner in which writs of summons are served (a), as to which see *ante*, p. 41.

Where a writ, of which the production is necessary, has been lost, the court or a judge, upon being satisfied of the loss and of the correctness of a copy thereof, may order that such copy shall be sealed and served in lieu of the original writ. (b)

If the plaintiff is unable to effect personal service, the court or a judge may make an order for substituted or other service, or for substitution of notice for service by advertisement or otherwise. (c) The application must be supported by an affidavit setting forth the grounds on which the application is made. (d)

The order will be made when the defendant has absconded and his address cannot be ascertained. But a notice in lieu of service will not be ordered to be given in ordinary cases where the defendant is within the jurisdiction. (e)

In an action to recover land in the case of vacant possession, service may be made by posting a copy of the writ upon the door of the dwelling-house or other conspicuous part of the property, if it cannot otherwise be effected. (f) It seems that a foreclosure action is not within this rule. (g)

The writ of summons having been served, the person making the service must, within three days at most, afterwards indorse on the writ the day of the month and week of service; otherwise the plaintiff will not be at liberty, in case of non-appearance, to proceed by default; and the affidavit of service must state the day on which the indorsement was made. (h)

If this rule is not complied with, the plaintiff, in case the

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| <p>(a) Ord. 11, r. 7.<br/>                 (b) Ord. 8, r. 3.<br/>                 (c) Ord. 9, r. 2.<br/>                 (d) Ord. 10.<br/>                 (e) <i>Cook v. Day</i>, 2 Ch. Div. 218;<br/>                 45 L. J. 611, Ch; 24 W. R.</p> | <p>362; <i>Coulborn v. Carshaw</i>, 32 W. R. 32.<br/>                 (f) Ord. 9, r. 9.<br/>                 (g) <i>Tawell v. Slate Company</i>, 3 Ch. Div. 629.<br/>                 (h) Ord 9, r. 15.</p> |
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defendant makes default, must proceed *de novo*, and again serve the defendant. It only applies, however, where the service has been personal, and not to cases of substituted service. (a) But where, through misadventure, the date of the service of a writ has not been indorsed within the time prescribed, the court can extend the time so as to make an indorsement made after the proper time, and all subsequent proceedings, valid. (b)

#### 4. RENEWAL AND AMENDMENT OF THE WRIT.

An original writ remains in force for twelve months from and including the day of the date thereof; but if the writ has not been served upon any defendant, the plaintiff may, before the expiration of the twelve months, apply to the court or a judge for leave to renew the writ; and if the court or judge is satisfied that reasonable efforts have been made to serve the defendant, or for other good reason, he may order that the original or concurrent writ be renewed for six months from the date of the renewal; and so from time to time during the currency of the renewed writ. (c)

The writ may, by leave of the court or a judge, be renewed after the twelve months have expired (d); unless the plaintiff's claim has become statute barred in the meantime. (e) And if the original writ has been lost it may be renewed by having a copy thereof sealed by order of the court or a judge on being satisfied of the loss and correctness of such copy. (f)

The writ is renewed by being marked by the proper officer with a seal bearing the date of renewal, on leaving with him a memorandum for that purpose. The renewed writ remains in force and is available to prevent the operation of the

(a) *Dymond v. Croft*, 45 L. J. 312, Ch.; 3 Ch. Div. 512; 34 L. T. N. S. 786; 24 W. R. 842.

(b) *Sproat v. Peckett*, 48 L. T. Rep. N. S. 755.

(c) Ord. 8, r. 1.

(d) *Eyre v. Cox*, 46 L. J. 604, Ch.; 25 W. R. 303.

(e) *Doyle v. Kaufman*, 3 Q. B. Div. 7, 340; 47 L. J. 26, Q. B.; 26 W. R. 98.

(f) Ord. 8, r. 3.

Statutes of Limitation, and for all other purposes, from the date of issue of the original writ of summons. (a)

The production of the writ bearing the seal of renewal is evidence of such renewal, and of the date of the commencement of the action, for all purposes. (b)

The court or a judge may, at any stage of the proceedings, allow the plaintiff to amend the writ on such terms as may seem just. (c)

5. DISCLOSURE AS TO ISSUE OF WRIT BY  
SOLICITOR, &c.

Every solicitor whose name is indorsed on a writ of summons must, on a written demand by or on behalf of any defendant who has been served therewith or who has appeared thereto, declare forthwith, in writing, whether the writ was issued by him or with his authority or privity, and if he replies in the negative all proceedings will be stayed, and no further proceedings can be taken thereupon without leave of the court or a judge. (d)

As to the disclosure of the names of a partnership firm when plaintiffs, see *ante*, p. 19, and when defendants, *ante*, p. 28.

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(a) Ord. 8, r. 1.  
(b) Ord. 8, r. 2.

(c) Ord. 16, r. 13; Ord. 28, rr.  
1, 12.  
(d) Ord. 7, r. 1.

## CHAPTER III.

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### APPEARANCE.

AFTER a defendant has been served with a writ of summons he should enter an appearance to the action.

### SECTION I.

#### MODE OF APPEARANCE.

If the writ was issued out of the Central Office in London the defendant must enter an appearance at that office. If the writ was issued out of a district registry and the defendant resides or carries on business within the district, he must appear in the district registry. If he neither resides nor carries on business within the district, he may appear either in the district registry or in London. (a)

When a defendant appears in London to a writ issued out of a district registry, the district registrar must transmit to the Central Office all original documents (if any) filed in the district registry, and a copy of all entries of proceedings in the books of the district registry. (b)

If the writ is served within the jurisdiction, the defendant must appear within eight days after service, inclusive of the day of such service.

If an order is made for service out of the jurisdiction, the defendant must, as before shown, appear within the time limited by the order.

Although a defendant does not appear within the time

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(a) Ord. 12, rr. 1, 2, 4, 5.

/ (b) Ord. 35, r. 20.

limited, he may nevertheless appear at any time before judgment. But he is not entitled to any further time for delivering his defence, &c., than if he had appeared according to the writ, unless the court or a judge otherwise orders. (a)

After judgment is signed, a defendant can only appear by leave of the court or a judge; he being bound by the judgment, and having liberty to attend the proceedings. (b)

An appearance is entered by delivering to the proper officer at the writ office of the Central Office or to the district registrar a written memorandum (in duplicate), dated the day of its delivery, and containing the name of the defendant's solicitor, or stating that the defendant defends in person. The officer seals the duplicate memorandum with a seal showing the date of sealing, and returns it to the person entering the appearance, and it is then a certificate of the date of appearance. (c)

The solicitor must, in addition to his name, state in the memorandum his place of business, and, if the appearance is entered in the Central Office, also an address for service not more than three miles from the principal entrance of the Central Hall at the Royal Courts of Justice; and if the appearance is entered in a district registry, an address for service within the district; and if the solicitor is only agent for another solicitor, he must add the name and place of business of the principal solicitor. (d)

So a defendant appearing in person must give his address and an address for service; in like manner varying according to whether he appears in London or in a district registry. (e)

The memorandum of appearance will not be received without such address; and if such address be illusory or fictitious, the appearance may be set aside. (f) Upon receipt

(a) Ord. 12, r. 22.  
(b) 1 Alph. Fr. 82.  
(c) Ord. 12, r. 8.

(d) Ord. 12, r. 10.  
(e) Ord. 12, r. 11.  
(f) Ord. 12, r. 12.

of the memorandum the officer enters the appearance in the cause book. (a)

The defendant must, on the day on which he enters appearance, give written notice thereof to the plaintiff's solicitor, or to the plaintiff himself, if he sues in person. This notice may be served in the ordinary way at the address for service, or sent by prepaid letter directed to that address posted in due course on the day of entering the appearance, accompanied in either case by the sealed duplicate memorandum. (b)

If notice be not given the appearance is incomplete, and the plaintiff may proceed to sign judgment. (c)

The effect of entering an ordinary appearance is to waive any irregularity in the prior proceedings, as well as to any objection to the jurisdiction. To avoid doing this the defendant may obtain leave to enter a conditional appearance. (d) But a defendant before appearing may, without obtaining an order to enter or entering a conditional appearance, serve notice of motion to set aside the service upon him of the writ, or of notice of the writ, or to discharge the order authorising such service. (e)

When partners are sued in the name of their firm they must appear individually in their own names, but all subsequent proceedings are to continue in the name of the firm. (f) And when one person carries on business in the name of a firm apparently consisting of more than one person, and is sued in the name of the firm, he must appear in his own name, but all subsequent proceedings are to continue in the name of the firm. (g)

When several defendants appear at the same time by the same solicitor, the names of all the defendants so appearing must be contained in one memorandum. (h)

(a) Ord. 12, r. 14.

(b) Ord. 12, r. 9.

(c) *Smith v. Dobin*, 3 Ex. Div. 388; 37 L. T. Rep. N. S. 777; 26 W. R. 122; 47 L. J. 65, Ex.

(d) 1 Alph. Pr. 83, 86; Ord. 70, r. 2.

(e) Ord. 12, r. 30.

(f) Ord. 12, r. 15.

(g) Ord. 12, r. 16.

(h) Ord. 12, r. 17.

When an action is brought for the recovery of land, a person not named as defendant in the writ of summons may, by leave of the court or a judge, appear and defend on filing an affidavit showing that he is in possession of the land, either by himself or his tenant. (a)

The person obtaining such leave must enter an appearance entitled in the original action, and, if he appears as landlord, so state it, and forthwith give notice of such appearance to the plaintiff's solicitor, or to the plaintiff if he sues in person, and he is to be named as a party defendant to the action in all subsequent proceedings. A defendant may also limit his defence to part only of the property, describing that part with reasonable certainty in the memorandum of appearance, or in a notice entitled in the action, and signed by him or his solicitor, such notice to be served within four days after appearance; and an appearance not so limited is to be deemed an appearance to defend for the whole. (b)

When a third person, not a party to the action, is served with a copy of the defence and counter-claim indorsed with a notice to appear within eight days, he must appear thereto in the same way as if served with a writ of summons to appear in an action. (c)

So when a person against whom a defendant is entitled to contribution or indemnity is not a party to the action, and leave is given by the court or judge to serve him with notice of his claim to relief, such person must appear within eight days from the service, or he will not be allowed to dispute the plaintiff's claim, and will be deemed to admit the validity of any judgment obtained against the defendant, whether obtained by consent or otherwise, and his own liability to contribute, unless the court or a judge gives him leave to appear after the eight days have expired. (d)

If a solicitor enters an appearance without authority, the

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(a) Ord. 12, r. 25.

(b) Ord. 12, rr. 26-29.

(c) Ord. 21, rr. 12, 13.

(d) Ord. 16, rr. 48, 49.



appearance may be ordered to be discharged with costs to be paid by him. (a)

A solicitor not entering an appearance in pursuance of his written undertaking to do so on behalf of any defendant is liable to an attachment. (b)

If the defendant, or all the defendants, if there are several, appear in a district registry, the action is to proceed there, unless removed to London by a defendant; and if the appearance is entered in London, the action is to proceed in London, unless the court or a judge otherwise orders. (c)

As to the mode in which infants, lunatics, and married women appear and defend actions, see *ante*, p. 29 *et seq.*

## SECTION II.

### PROCEEDINGS ON DEFAULT OF APPEAR- ANCE, &c.

As a general rule, in the class of actions assigned to the Chancery Division of the High Court, if the party served with the writ does not appear thereto within the time limited for appearance, on filing by the plaintiff of an affidavit of service, and of a statement of claim, the action (not being for an account) may proceed as if the defendant had appeared. (d) And where a writ of summons is indorsed for an account, or where the indorsement on a writ of summons involves taking an account, if the defendant either fails to appear, or does not after appearance satisfy the court or a judge that there is some preliminary question to be tried, an order for the proper accounts and inquiries will be forthwith made. (e) This application should be made by summons, supported by an affidavit stating the grounds of the claim for an account. (f)

(a) 1 Alph. Pr. 87.

(b) Ord. 12, r. 18.

(c) Ord. 12, rr. 6, 7.

(d) Ord. 13, r. 12.

(e) Ord. 15, r. 1.

(f) Ord. 15, r. 2; and see *Gatti v. Webster*, 12 Ch. Div. 774; 41 L. T. Rep. N. S. 18; 48 L. J. 763, Ch.

A special mode of procedure is provided by the rules of court where the writ of summons is indorsed for a liquidated demand, or for the detention of goods and pecuniary damages, or either of them; but, as these are claims usually sued for in the Queen's Bench Division, the student is referred to the rules, *et post*, Ch. 25. (a)

As to indorsing the writ with the fact of service, see *ante*, p. 45. The affidavit of service must mention the date on which the indorsement was made. (b)

If the defendant does not deliver a defence within due time the plaintiff may set the action down on motion for judgment, and such judgment will be given as upon the statement of claim the court or judge considers the plaintiff to be entitled to. (c)

As to the proper mode of proceeding when no appearance has been entered to a writ of summons for a defendant who is an infant or person of unsound mind not so found by inquisition, see *ante*, p. 33.

In case of default of appearance to an action for the recovery of land, or if the defence is limited to part only, the plaintiff may enter judgment that the person whose title is asserted in the writ of summons shall recover possession of the land, or of that part to which the defence does not apply. (d)

Where the defendant appears to a writ of summons specially indorsed under Order III., r. 6, that is, for a liquidated demand (see *ante*, p. 36), a claim not applicable to the class of actions usually assigned to the Chancery Division, unless the claim arises on a trust, or is for the recovery of land, the plaintiff may, on an affidavit made by himself, or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed, if any, and stating that, in his belief, there is no defence to the action, apply to a judge for liberty to enter final judgment

(a) Ord. 13, rr. 3-7.

(b) Ord. 9, r. 15.

(c) Ord. 27, r. 11.

(d) Ord. 13, r. 8; where a claim for mesne profits is added, see r. 9, and as to default of pleading see Ord. 27, rr. 7, 8, *et post*.

for the amount so indorsed, with interest, if any, or for the recovery of the land, with or without rent or mesne profits, as the case may be, and costs. And unless the defendant, by affidavit or otherwise, satisfies the judge that he has a good defence to the whole or part of the plaintiff's claim in the action on the merits, or discloses such facts as may be deemed sufficient to entitle him to defend, as by offering to bring the amount indorsed on the writ (except in actions for the recovery of land) into court, an order may be made empowering the plaintiff to enter judgment accordingly. If, however, the defendant so satisfies the judge as above stated, leave to defend may be given unconditionally, or subject to such terms as to security or otherwise as the judge may think fit. (a)

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(a) See Ord. 14, rr. 1-6.

## CHAPTER IV.

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### GENERAL RULES AS TO PLEADINGS, APPLICATIONS, AND TIME.

AFTER the defendant has entered an appearance and given the plaintiff notice thereof, the pleadings, or documentary forms, by means of which the litigants lay the grounds of their claim and defence, respectively, before each other and before the court, may commence. Before, however, we state in detail the various pleadings in an action, we will briefly give the general rules applicable to pleadings, applications to the court or judge, and as to time.

#### SECTION I.

##### GENERAL RULES AS TO PLEADINGS.

The term "pleading" not only includes the statement of claim by the plaintiff, and of defence by the defendant, and of reply by the plaintiff to any counter-claim of the defendant, but also any petition or summons. (a)

Every pleading must be delivered between parties and be marked on its face with the date of delivery, the letter and number of the action, the division of the court, and the name of the judge to whom the action is assigned, the title of the action, i.e., the names of the plaintiff and defendant, and the description of the pleading, which must be indorsed with the name and place of business of the solicitor and agent, if one, or the name and address of the party delivering the same, if he acts in person. (b)

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(a) 36 & 37 Vict. c. 66, s. 100. | (b) Ord. 19, r. 11.

Every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies, but not the evidence by which they are to be proved, and must, when necessary, be divided into paragraphs, numbered consecutively; and dates, sums, and numbers are to be expressed in figures and not in words. (a)

The signature of counsel is not necessary, but where pleadings have been settled by counsel or a special pleader, they must be signed by him, and if not so settled they must be signed by the solicitor, or by the party if he sues or defends in person. (b)

Any pleading which contains less than ten folios (every figure being counted as one word) may be either printed or written, or partly printed and partly written, every other pleading, not being a petition or summons, must be printed. A folio is to comprise seventy-two words, every figure being counted as one word. (c)

Each party must raise by his pleading all matters which show the action or counter-claim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the previous pleadings; as, for instance, fraud, statute of limitations, release, payment, performance, or the Statute of Frauds. (d)

No pleading, not being a petition or summons, must, except by way of amendment, raise any new ground of claim, or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same. (e)

Neither party need allege in his pleading any matter of fact which the law presumes in his favour, or of which the burden of proof lies upon the other side, unless the same has first been specifically denied. (f)

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(a) Ord. 19, r. 4.

(b) Ord. 19, r. 4.

(c) Ord. 19, r. 9; Ord. 65, r. 27,  
sub-r. 14.

(d) Ord. 19, r. 15.

(e) Ord. 19, r. 16.

(f) Ord. 19, r. 25.

The contents of documents, when material, are to be set out briefly, unless the precise words of the documents, or any part thereof, are material. (a)

Whenever any contract or relation between persons is to be implied from a series of letters or conversations, or other circumstances, it is sufficient to allege such contract or relation as a fact, and to refer generally to such letters, &c., without setting them out in detail. But if the person pleading desires to rely in the alternative upon more than one contract or relation so implied, he may state the same in the alternative. (b)

When it is material to allege notice to a person of any fact or matter, it is sufficient to allege such notice as a fact, unless the form or precise terms of such notice, or the circumstances from which it is to be inferred, be material. (c)

When any pleading denies an allegation of fact in the pleading of the opposite party, it must not be done generally or evasively, but specifically, and must answer the point of substance. (d)

Every allegation of fact in any pleadings (not being a petition or summons), if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, is to be taken to be admitted, except as against an infant, lunatic, or person of unsound mind not so found by inquisition. (e)

Where a contract or promise is alleged in any pleading, a bare denial of it is to be construed only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the same may be implied by law, and not as a denial of the legality or sufficiency in law of such contract or promise, whether with reference to the Statute of Frauds or otherwise. (f)

Any condition precedent, the performance or occurrence of

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(a) Ord. 19, r. 21.

(b) Ord. 19, r. 24.

(c) Ord. 19, r. 23.

(d) Ord. 19, rr. 17, 19.

(e) Ord. 19, r. 13.

(f) Ord. 19, r. 20.

which is intended to be contested, must be distinctly specified in his pleading by the plaintiff or defendant, and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of either party is to be implied in his pleading. (a)

When it is material to allege malice, fraudulent intention, knowledge, or other condition of the mind of any person, it is sufficient to allege the same as a fact, without setting out the circumstances from which it is to be inferred. (b)

In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, &c., particulars (with dates and items, if necessary) are to be stated in the pleading. (c)

No technical objection can be raised to any pleading on the ground of any alleged want of form. (d)

As before stated, every pleading is to be delivered between parties; but if no appearance has been entered for any party, then such pleading or document is to be delivered by being filed with the proper officer. (e)

If a party appears by solicitor, then the pleading is to be delivered to him; and to the party himself if he appears in person. (f)

The court or a judge may at any stage of the proceedings, and on such terms as may seem just, allow either party to alter or amend his indorsement or pleading, and all such amendments shall be made as are necessary for determining the real question or issue in controversy between the parties. (g)

The court will not allow a pleading to be amended if a party to the action would be seriously and irretrievably damaged thereby. (h)

(a) Ord. 19, r. 14.

(b) Ord. 19, r. 22.

(c) Ord. 19, r. 6.

(d) Ord. 19, r. 26.

(e) Ord. 19, rr. 10, 11; and see *Renshaw v. Renshaw*, 49 L. J. 127, Ch.; 42 L. T. Rep. N. S. 353; 28 W. R. 409.

(f) Ord. 19, r. 10.

(g) Ord. 28, rr. 1, 12.

(h) *Tildsley v. Harper*, 10 Ch. Div. 393; 39 L. T. Rep. N. S. 552; 27 W. R. 249; 48 L. J. 495, Ch.; *Claprade and Co. v. Commercial Union Association*, 32 W. R. 151.

A pleading cannot, it seems, be amended after final judgment or decree. (a)

The application for leave to amend any pleading may be made either to the court or a judge at chambers, or to the judge at the trial of the action, and may be allowed upon such terms as may be just. (b)

The amendments may be made by written alterations in the pleading, and by additions on paper interleaved therewith, if necessary, if under 144 words in any one place; but if the amendments exceed this, or are so numerous or of such a nature as to render the document difficult to read, then the amendment must be made by delivering a print of the document as amended. (c)

An amended pleading must be marked with the date of the order, if any, giving leave to amend, and the day on which the amendment is made. (d)

The amendment must be made, and the amended pleading delivered, within the time limited by the order, or if no time is limited thereby, within fourteen days from the date of the order, otherwise the order becomes *ipso facto* void, unless the time is extended by the court or a judge. (e)

When any party has amended his pleading without leave under rules 2 and 3 of Order XXVIII. (to be treated of subsequently), the opposite party may, within eight days from the delivery of the amended pleading, apply to the court or a judge to disallow the amendment, and it may be disallowed or allowed on such terms as may be just. (f)

Any party to a cause or matter may give notice by his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party. (g)

Non-compliance with the rules of court or of practice

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(a) *Attorney-General v. Corporation of Birmingham*, 15 Ch. Div. 423; 43 L. T. Rep. N. S. 77; 29 W. R. 127.

(b) Ord. 28, rr. 1, 6.

(c) Ord. 28, r. 8.

(d) Ord. 28, r. 9.

(e) Ord. 28, rr. 7, 10.

(f) Ord. 28, r. 4.

(g) Ord. 32, r. 1.



does not render any proceedings void, unless the court or a judge so directs; but they are liable to be set aside as irregular, either altogether or in part, or to be amended, &c., upon such terms as the court or judge thinks fit. (a)

## SECTION II.

### GENERAL RULES AS TO INTERLOCUTORY APPLICATIONS.

We have several times alluded to orders being made by the court or a judge, and shall have occasion again to do so in future pages. It will be better, therefore, at once to state how these orders are obtained. The orders to which we refer are not those made on the hearing of a cause, but on some interlocutory application.

There are three modes by which an interlocutory order may be obtained, viz., by motion, by petition, and by summons, not being a summons originating proceedings.

All these various modes of application will be treated of in subsequent pages in their proper place; it will be sufficient for our present purpose to state that, if an application is made to a divisional court or a judge sitting in court, and no long statement is required, in addition to the pleadings, to indicate the point to be decided, the application should be made by motion (b), and if the nature of the application requires, in addition to the pleadings, a written statement of the grounds of the application, the proper course is to present a petition, (c) and in certain simple cases the order required can be obtained at chambers, (d) and all applications made at chambers, not made *ex parte*, must be made by summons (e), whether made to the judge himself or his chief clerk.

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(a) Ord. 70, r. 1.

(b) See Draw. Pr. 52; Will. Pet. 2; Ord. 52, r. 1.

(c) Draw. Pr. 52; 38 & 39 Vict. c. 77, s. 21; Will. Pet. 2.

(d) Ord. 55, r. 2.

(e) Ord. 54, r. 1.

As a general rule no motion can be made without previous notice to the parties affected thereby. But the court or a judge, if satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief, may make any order *ex parte* upon such terms as to costs or otherwise, and subject to such undertaking, if any, as the court or judge may think just; and any party affected by such order may move to set it aside. (a) An application for an order for a *mandamus* or an injunction or a receiver may be made either *ex parte* or with notice. (b)

If on the hearing of a motion or other application the court or judge is of opinion that any person to whom notice has not been given should have had notice, the court or judge may either dismiss the motion or application or adjourn the hearing thereof, in order that notice may be given, on such terms, if any, as may be imposed. (c)

The plaintiff may, without leave, serve a notice, petition, or summons upon any defendant who, having been duly served with a writ of summons to appear, has made default in appearance. (d) The service in this case is effected by filing the notice, &c., with the proper officer. (e)

After the defendant has appeared the service may be made at the address for service. If the application is made on behalf of a defendant the service may be at the plaintiff's place of residence or address for service if he sues in person, and if he sues by a solicitor, then the service may be at the place of business or address for service of such solicitor. (f)

There must, unless the court or judge gives special leave to the contrary, be two clear days between the service of a notice of motion and the hearing of such motion, and between the service and hearing of a petition (g), and

(a) Ord. 52, r. 3.

(b) Ord. 50, rr. 6, 11.

(c) Ord. 52, r. 6.

(d) Ord. 52, r. 8.

(e) See Ord. 19, r. 10; *Morton*

*v. Miller*, 3 Ch. Div. 516; 45 L. J. 613, Ch.; 24 W.R. 723; Ord. 67, r. 4.

(f) See Ord. 67, r. 2; Ord. 4, rr. 1, 2, 3; Ord. 12, rr. 9, 10, 11.

(g) Ord. 52, rr. 5, 17.

between the service and return of a summons at chambers, not originating proceedings. (a)

An interlocutory order does not take effect till it is drawn up and served on the opposite party. (b)

### SECTION III.

#### GENERAL RULES AS TO TIME.

Where any particular number of days, not expressed to be clear days, is prescribed by the rules of court, the same are to be reckoned exclusively of the first and inclusively of the last day. (c)

Where by the rules of court, or by any judgment or order, the time for doing an act or taking a proceeding is limited by months, and where the word "month" occurs in any document which is part of any legal procedure under the rules of court, such time is to be computed by calendar months unless otherwise expressed. (d)

Where a time less than six days from or after any date is allowed for doing an act or taking a proceeding, Sunday, Christmas-day, and Good Friday are not to be reckoned in computation of such time. (e)

Where the time for doing an act or taking a proceeding expires on Sunday or other day on which the offices are closed, it may be done or taken on the day on which the offices are next open. (f)

No pleadings can be amended or delivered in the Long Vacation unless so directed by the court or a judge; and the time of the Long Vacation is not to be reckoned in the computation of the time appointed or allowed for filing,

(a) Ord. 54, r. 4. If the summons originates proceedings, there must be seven clear days between the service and return.

(b) *Metcalf v. The British Tea*

*Association*, 46 L. T. Rep. N. S. 31.

(c) Ord. 64, r. 12.

(d) Ord. 64, r. 1.

(e) Ord. 64, r. 2.

(f) Ord. 64, r. 3.

amending, or delivering any pleading, unless otherwise directed by the court or a judge. (a)

Service of pleadings, notices, summons, orders, rules, and other proceedings must be effected before the hour of six in the afternoon, except on Saturdays, when it must be before the hour of two in the afternoon. If effected after six on any week-day except Saturday, the service will be deemed to have been made on the following day, and if effected after two on Saturday the service will be deemed to have been effected on the following Monday. (b)

A court or judge has power to enlarge or abridge the time appointed by the rules of court, or fixed by an order enlarging the time, for doing any act or taking any proceeding, upon such terms as the justice of the case may require, and such enlargement may be ordered, although the application for it is not made until after the expiration of the time allowed. (c)

Where the delay was caused by a slip of the solicitor's clerk, the time was enlarged after the expiration of the time allowed. (d)

The time for delivering or amending, or filing any pleading or document, may be enlarged by written consent without application to the court or a judge. (e)

The costs of an application to extend the time for taking any proceeding are in the discretion of the taxing master, in the absence of an order of the court or a judge to the contrary. And the taxing master is not to allow the costs of more than one extension of time, unless he is satisfied that such extension was necessary and could not, with due diligence, have been avoided. And the costs of a summons to extend time is not to be allowed, unless the opposite party has been asked to consent in cases where he may do

(a) Ord. 64, rr. 4, 5.

(b) Ord. 64, r. 11.

(c) Ord. 64, r. 7.

(d) *Canadian Oil Works v. Hay*,  
38 L. T. Rep. N. S. 549.

(e) Ord. 64, r. 8.

so, and he has not consented to a sufficient extension of time, &c. (a)

In any cause or matter in which there has been no proceeding for one year from the last proceeding had, the party desiring to proceed must give a month's notice to the other party of his intention to proceed. A summons on which no order has been made is not, but a notice of trial though countermanded is, to be deemed a proceeding within this rule. (b)

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(a) See Ord. 65, r. 27, sub-rule  
24; Ord. 64, r. 8.

| (b) Ord. 64, r. 13.

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## CHAPTER V.

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### SUMMONS FOR DIRECTIONS.

THE defendant having appeared to the writ of summons, and given the plaintiff notice thereof, the next ordinary step in the action is the preparation and delivery of a statement of claim by the plaintiff. However, before doing this the plaintiff may find it advisable to take out a summons for directions.

By Order XXX. it is provided that in every cause or matter one general summons for directions may be taken out at any time by any party with respect either to particulars of claim, defence, or reply, statement of special case, discovery (including interrogatories), commissions, and examination of witnesses, mode of trial (including proceedings in lieu of demurrer, trial on motion for judgment and reference), place of trial, and any other matter or proceeding in the cause or matter previous to trial. (a)

This summons is to be returnable in not less than four days, and is to be addressed to and served upon all such parties to the cause or matter as may be affected thereby. All or as many of the above-named matters and proceedings are to be included in the summons as, having regard to the nature of the cause or matter, can conveniently be dealt with by the order and directions of the court or judge. Upon the hearing of the summons any party to whom it is addressed may apply for any order or directions as to any of the above-mentioned matters or proceedings, and thereupon,

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(a) Ord. 30, r. 1.

after giving notice to such parties (if any) as the court or judge may direct, an order may be made and all necessary directions given as to all or any of such matters or proceedings as may be just, whether applied for or not. (a)

And if, upon any other application as to any of the above-mentioned matters or proceedings, it appears to the court or judge that it is one that could and ought to have been included or made upon the general summons for directions, the application is to be granted only at the costs of the party making it. (b)

Under the rules of this order the court is, it will be observed, enabled at any early stage of the action to exercise a close supervision over the proceedings therein, and to prevent a too constant resort to chambers, and thus save costs.

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(a) Ord. 30, r. 2.

| (b) Ord. 30, r. 3.

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CHAPTER VI.

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## STATEMENT OF CLAIM.

THE summons for directions, if one has been taken out, having been disposed of, the plaintiff should next proceed to prepare and deliver his statement of claim, which must be as brief as the nature of the case will admit, for, if bound to deliver such statement, and he does not do so within due time, the court or a judge may, on the defendant's application, dismiss the action with costs for want of prosecution. (a)

The delivery of a statement of claim is regulated as follows:—

(1.) No statement of claim *shall* be delivered where the writ is specially indorsed under Order III., r. 6; nor (2) *need* it be delivered unless the defendant, at the time of entering appearance, or within eight days thereafter, gives written notice to the plaintiff or his solicitor that he requires a statement of claim to be delivered; but (3) if the defendant so requires its delivery the plaintiff *shall*, unless otherwise ordered by the court or a judge, deliver it within five weeks from the time of receiving the notice. (b)

(4.) The plaintiff *may* (except as stated in number (1) *supra*), deliver a statement of claim either with the writ of summons or notice in lieu of writ of summons, or at any time afterwards, either before or after appearance, although the defendant may have appeared and not required the delivery of a statement of claim. But in no case where a defendant has appeared can a statement be delivered more

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(a) Ord. 19, r. 2; Ord. 27, r. 1. | (b) Ord. 20, r. 1.



than six weeks after such appearance, unless otherwise ordered by the court or a judge. (a)

And to check unnecessary pleading it is further ordered that where the plaintiff delivers a statement of claim without being required to do so, or the defendant unnecessarily requires such statement, the court or a judge may make such order as to the costs occasioned thereby as shall be just, if it appears that the delivery of a statement of claim was unnecessary or improper. (b)

The general rules as to pleadings, stated fully *ante*, p. 55 *et seq.*, as to marking them with the title of the court and the cause, the name and address of the solicitor, the allegations, paragraphs, figures, printing, signature of counsel, &c., apply to the statement of claim.

After the facts have been set out, the statement of claim must then state specifically the relief the plaintiff claims either simply or in the alternative, and it is not necessary to ask for general or other relief, which may always be given as the court or a judge may think just to the same extent as if it had been asked for. (c)

Where relief is sought in respect of several distinct claims or causes of complaint, founded upon separate and distinct grounds, they must, as far as possible, be stated separately and distinctly. (d)

As to the joinder of different causes of action see *ante*, pp. 38, 39.

There is now no local venue; and if the plaintiff desires to have the action tried elsewhere than in Middlesex, he must, in his statement of claim, name the county or place in which he proposes to have the action tried, and the trial will take place there unless otherwise ordered. If there be no statement of claim the place of trial is to be specified in a written notice, to be served on the defendant or his solicitor, within

(a) Ord. 20, r. 1.

(b) Ord. 20, r. 1.

(c) Ord. 20, r. 6.

(d) Ord. 20, r. 7.

six days after appearance. And where no place of trial is named, the place of trial is, unless the court or a judge otherwise order, to be the county of Middlesex. (a)

A further and better statement of the nature of the claim may be ordered upon such terms as to costs and otherwise as may be just. (b)

If the statement of claim is served personally at the time the writ is served, and the defendant does not appear in the action, it is not necessary that it should also be filed (see *ante*, p. 58) in order to obtain judgment by default. (c)

It may become necessary to amend the statement of claim; the plaintiff may do so once without leave at any time before the expiration of the time limited for reply, and before replying, or where no defence is delivered, within four weeks from the appearance of the defendant who last appeared. (d)

Leave may be given to a plaintiff to amend his statement of claim in such a way as to raise an entirely new case. (e)

As to amendments generally, the time and mode of making the amendments, delivering the amended pleading, the effect of neglecting to amend, disallowing the amendments, &c., see *ante*, pp. 58, 59, all of which apply to the statement of claim.

The court or a judge may, at any stage of the proceedings, order any matter in the statement of claim to be struck out or amended which is unnecessary or scandalous, or tends to prejudice, embarrass, or delay the fair trial of the action, and may order the costs of the application to be paid as between solicitor and client. (f)

Scandal consists in the allegation of anything in a pleading in language which it is unbecoming the court to hear, or

(a) Ord. 20, r. 5; Ord. 36, r. 1.

(b) Ord. 19, r. 7.

(c) *Renshaw v. Renshaw*, 49 L. J. 127, Ch.; 42 L. T. Rep. N. S. 853; 28 W. R. 409.

(d) Ord. 28, r. 2.

(e) *Budding v. Murdock*, 1 Ch. Div. 42.; 45 L. J. 213, Ch.; 24 W. R. 23.

(f) Ord. 19, r. 27.

contrary to good manners, or anything set forth which charges a person with a crime not necessary to be shown in the cause. (a)

The whole statement of claim may be struck out when it is unintelligible or irrelevant (b); or where it is prolix and states evidence instead of facts. (c)

The application to strike out may be made to the court by motion, (d) or to a judge at chambers by summons. According to a decision of Jessel, M. R., the latter is the proper mode. (e)

The following shows the formal parts of a statement of claim:—

In the High Court of Justice,  
Chancery Division.

1884. A. No. 4.

Writ issued 11th January, 1884.

Between Jane Styles ... .. Plaintiff,  
and  
James Styles ... .. Defendant.

#### STATEMENT OF CLAIM.

The plaintiff, &c. [*here follow the facts in support of the claim*].

The plaintiff claims [*here follows the claim for relief*].

Place of trial

Signed

Delivered the

of

1884.

No action or proceeding is to be open to objection because a merely declaratory judgment or order is sought thereby; and the court may make binding declarations of right, whether any consequential relief is or could be claimed or not. (f)

The plaintiff may, by his statement of claim, alter, modify, or extend his claim without any amendment of the indorsement of the writ. (g)

(a) Ayck. Ch. Pr. 343, 9th ed.;  
*Coyle v. Cuming*, 40 L. T. Rep.  
N. S. 455; 25 W. R. 529.

(b) *Cashin v. Craddock*, 3 Ch.  
Div. 376, C. A.; 35 L. T. Rep. N. S.  
452; 25 W. R. 4.

(c) *Davy Brothers v. Garrett*, 47

L. J. 218, Ch.; 7 Ch. Div. 473; 26  
W. R. 110, C. A.

(d) *Coyle v. Cuming (sup.)*.

(e) *Marriott v. Marriott*, 26 W.  
R. 416.

(f) Ord. 25, r. 5.

(g) Ord. 20, r. 4.

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It may be necessary for a plaintiff during the preparation of a cause for trial to obtain a discovery of facts or documents from a defendant.

The plaintiff may, in actions founded on fraud or breach of trust, interrogate the defendant without leave at any time after delivering his statement of claim. (a)

He may also, in every other cause or matter, by leave of the court or a judge, obtain a discovery from the defendant. (b)

With these brief remarks, we must here dismiss this subject. A separate chapter will be given on discovery.

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(a) Ord. 31, r. 1.

| (b) Ord. 31, rr. 1, 12

## CHAPTER VII.

## THE DEFENCE.

If the defendant intends to contest the plaintiff's claim he may do so, either by statement of defence or by counter-claim.

1. If he wishes to deny the allegations of fact in the statement of claim, and to adduce counter facts in support of his defence, his pleading is termed a *statement of defence*. And he may, as will be shown in a subsequent chapter, obtain from the plaintiff a discovery either of facts or documents, in aid of his defence.

2. If he has any right or claim against the plaintiff, whether sounding in damages or not, he may set up such right or claim by way of *counter-claim*.

Formerly, if the statement of claim, on its face, showed no cause of action in law to which effect could be given by the court, the defendant might have objected thereto by demurrer. No demurrer, however, is now allowed. (a)

And any party may raise by his pleading any point of law, which is to be disposed of by the judge who tries the cause at or after the trial. But by the consent of the parties or order of the court or a judge the same may be set down for hearing and disposed of at any time before trial. (b) We shall, however, subsequently again refer to this matter.

There are also certain other proceedings which may be taken by a defendant to relieve himself, either wholly or partially, from the plaintiff's claim in the action :

(1) If the defendant is entitled to contribution or indemnity

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(a) Ord. 25, r. 1.

| (b) Ord. 25, r. 2.

against some person other than the plaintiff, he may, on notice being given to such other person, apply to the court or judge for an order directing the question to be tried as to the liability of such third party to make the contribution or indemnity.

(2) In an action for debt or damages the defendant may pay a sum of money into court in satisfaction of the plaintiff's claim.

These various modes of proceeding will be treated of under their proper heads in subsequent pages.

It has already been stated that no technical objection can be raised to any pleading on the ground of any alleged want of form (*a*); and that no plea or defence can be pleaded in abatement. (*b*)

## SECTION I.

### STATEMENT OF DEFENCE.

Where a statement of claim has been delivered to a defendant he must deliver his defence, which must be as brief as the nature of the case will admit, within ten days from the delivery of the statement of claim, or from the time limited for appearance, whichever shall be last, unless the time is extended by the court or a judge (*c*); or by the written consent of the plaintiff (*d*); otherwise the plaintiff may set the action down on motion for judgment. (*e*)

A defendant who has appeared in an action, and who has neither received nor required the delivery of a statement of claim, must deliver his defence (if any) within ten days after his appearance, unless this time is extended by the court or a judge (*f*); or by the written consent of the plaintiff. (*g*)

The general rules respecting pleadings stated *ante*, p. 55

(*a*) Ord. 19, r. 26.

(*b*) Ord. 21, r. 20.

(*c*) Ord. 19, r. 2; Ord. 21, r. 6.

(*d*) Ord. 64, r. 8.

(*e*) Ord. 27, r. 11.

(*f*) Ord. 21, r. 7.

(*g*) Ord. 64, r. 8.

*et seq.*, as to marking the title of the court and cause, the name and address of the solicitor, &c., allegations, denials, paragraphs, figures, printing, signature, delivery, &c., apply to the defence.

It is not sufficient for a defendant in his statement of defence to deny generally the grounds alleged by the statement of claim, but he must deal specifically with each allegation of fact of which he does not admit the truth, except damages. And this must not be done evasively, but the defendant must answer the point of substance. (a) For, as we have before (*ante*, p. 57) stated, every allegation of fact in the statement of claim, if not denied specifically or by necessary implication, or stated to be not admitted, will be taken as admitted, except as against an infant, lunatic, or person of unsound mind not so found on inquisition. (b)

Thus, where a statement of defence merely said "the defendant denies all and every the allegations in the several paragraphs of the statement of claim respectively contained," it was held bad. (c) And where a defendant by his statement of defence simply "put the plaintiff to proof of all the allegations contained in his statement of claim," he was held to have admitted the facts alleged in the statement of claim. (d)

No denial or defence is necessary, however, as to damages claimed, or their amount; but they are to be deemed to be put in issue in all cases, unless expressly admitted. (e)

If either party wishes to deny the right of any other party to claim as executor, or as trustee, or in any representative or other alleged capacity, for the alleged constitution of a partnership firm, he must deny the same specifically. (f)

Payment into court is to be signified in the defence, and

(a) Ord. 19, rr. 17, 19.

(b) Ord. 19, r. 13.

(c) *Jones v. Quinn*, 40 L. T. Rep. N. S. 135.

(d) *Harris v. Gamble*, 7 Ch. Div.

877; 38 L. T. Rep. N. S. 253; 47 L. J. 344, Ch.

(e) Ord. 21, r. 4.

(f) Ord. 21, r. 5.

the claim or cause of action in satisfaction of which such payment is made is to be specified therein. (a)

Any ground of defence which has arisen after action brought, but before delivery of the statement of defence and before the time for its delivery has expired, may be raised by the defendant in his statement of defence, either alone or with other grounds of defence; and if it arises after the statement of defence is delivered, or after the time limited for its delivery has expired, the defendant may, within eight days after the ground of defence arose, or at any subsequent time, by leave of the court or a judge, deliver a further defence, setting forth the same. (b)

If such defence be pleaded the plaintiff may deliver a confession thereof, and sign judgment for his costs up to the time of the pleading of such defence, unless the court or judge otherwise orders. (c)

No defendant in an action for the recovery of land who is in possession by himself or his tenant need plead his title unless his defence depends on an equitable estate or right, or he claims relief upon equitable grounds. It being sufficient to state by way of defence that he is so in possession, and it is to be taken to be implied that he denies, or does not admit, the allegations of fact contained in the statement of claim. He may, however, rely upon any ground of defence which he can prove except as before mentioned. (d)

The statement of defence may be amended at any stage of the proceedings by leave of the court or a judge. (e)

As to amendments generally, the time and mode of making the amendments, delivering the amended pleading, and the effect of neglecting to amend, disallowing the amendments, &c., see *ante*, pp. 58, 59, all of which apply to the statement of defence.

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(a) Ord. 22, r. 2.

(b) Ord. 24, rr. 1, 2.

(c) Ord. 24, r. 3.

(d) Ord. 21, r. 21; and see

*Darnford v. McNulty*, 8 App. Cas. 456; 49 L. T. Rep. N. S. 207.

(e) Ord. 28, rr. 1, 6.



The court or a judge may at any stage of the proceedings order any matter in the statement of defence to be struck out which is unnecessary or scandalous, or tends to prejudice, embarrass, or delay the fair trial of the action; and may order the costs of the application to be paid as between solicitor and client. (a)

As to what is scandal, see *ante*, p. 69.

A pleading is "embarrassing" that brings forward a defence which the defendant is not entitled to use. (b)

The defendant may by his statement of defence give notice to the plaintiff that he admits the truth of the whole or any part of the case of the plaintiff. (c)

The following are the formal parts of a statement of defence:—

1884. A. No. 4.

In the High Court of Justice,  
Chancery Division.

Between Jane Styles ... .. Plaintiff,  
and  
James Styles ... .. Defendant.

DEFENCE.

The defendant says that [*here follow the grounds of the defence in numbered paragraphs*].

(Signed)

Delivered

It may happen that the plaintiff is acquainted with matters favourable to the defendant's case which are necessary before trial and which do not appear in the statement of claim, and which the defendant has no means of proving save by the plaintiff's own oath, or by documents in his possession or power. It is provided, therefore, by rules of court, that the defendant may obtain such discovery; but, as before stated, a separate chapter will be devoted to discovery, to which the reader is referred.

(a) Ord. 19, r. 27.

(b) *Heugh v. Chamberlain*, 25 W. R. 742; *Harris v. Jenkins*, 47 L. T. Rep. N. S. 570; *Liardet v.*

*Hammond Electric Light and Power Company*, 31 W. R. 710.

(c) Ord. 32, r. 1.

## SECTION II.

### COUNTER-CLAIM.

A defendant in an action may set off or set up by way of counter-claim against the claims of the plaintiff any right or claim, whether sounding in damages or not, against the plaintiff alone, or jointly with any other person or persons. And such counter-claim or set-off has the same effect as a cross action enabling the court to pronounce a final judgment in the same action, both on the original and cross claim. But the court or a judge may, on the application of the plaintiff before trial, refuse permission to the defendant to avail himself thereof, if such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed. (a)

Where any defendant seeks to rely upon any grounds as supporting a right of counter-claim he must, in his statement of defence, state specifically that he does so by way of counter-claim. (b)

Where the defendant counter-claims against the plaintiff jointly with a third person, the relief claimed must be connected with the original subject-matter of the action. (c) But this is not necessary when the counter-claim is against the plaintiff alone. The court may exclude such counter-claim if it would unduly delay the action. (d)

A counter-claim cannot, it seems, be made against a third party alone. (e)

A pleading which seeks for no cross relief against a

(a) Ord. 19, r. 3; Ord. 21, rr. 11, 15; *Gray v. Webb*, 21 Ch. Div. 802; 51 L. J. 815, Ch.; 46 L. T. Rep. N. S. 913; 31 W. R. 8.

(b) Ord. 21, r. 10; see hereon *Original Hartlepool Colliery Company v. Gibbs*, 5 Ch. Div. 713; 36 L. T. Rep. N. S. 433; 46 L. J. 311, Ch.; *Beddall v. Maitland*, 17 Ch. Div. 174; 50 L. J. 401, Ch.;

44 L. T. Rep. N. S. 240; 29 W. R. 484.

(c) *Padwick v. Scott*, 2 Ch. Div. 736; 45 L. J. 350, Ch.; 24 W. R. 723; *Harris v. Gamble*, 6 Ch. Div. 748; 46 L. J. 768, Ch.

(d) *Gray v. Webb (sup.)*.

(e) *Barber v. Blaiberg*, 19 Ch. Div. 473; 46 L. T. Rep. N. S. 52.

plaintiff, either alone or jointly with some other person, is not a "counter-claim," and must not be so entitled. (a)

A counter-claim may be joined with a statement of defence, but, as above stated, the grounds on which the defendant relies in support of the counter-claim must be distinguished from those constituting the defence. (b)

The title of a counter-claim, both in the court and cause, is the same as that of a statement of defence; but where a defendant counter-claims against the plaintiff and any other persons he must add to the title of the defence a further title, similar to that of a statement of claim, setting forth the names of the persons who, if the counter-claim were to be enforced by cross action, would be defendants to such cross action, and must deliver his statement of defence to such of them as are parties to the action within the period within which he is required to deliver it to the plaintiff, (c) as to which see *ante*, p. 73, *et post*, p. 79.

Although the facts in support of the statement and defence, when joined together, must be kept separate and distinct, yet if facts have been stated in the defence, and are also relied upon in support of the counter-claim, it is not necessary to repeat them *in extenso*; it is sufficient to refer to them thus: The defendant repeats paragraph No. (naming it). (d)

The counter-claim must state specifically the relief claimed, either simply or in the alternative, and it is not necessary to ask for general relief, which may always be given by the court or judge as if it had been asked for. But where the defendant relies upon several distinct grounds of defence, set-off or counter-claim, founded upon separate and distinct facts, they must, as far as may be, be stated separately and distinctly. (e)

(a) *Furness v. Booth*, 4 Ch. Div. 586; 46 L. J. 112, Ch.; 25 W. R. 267.

(b) Ord. 21, r. 10; *Crowe v. Barnicott*, 6 Ch. Div. 753; 37 L. T. Rep. N. S. 68; 46 L. J. 855, Ch.; 25 W. R. 789.

(c) Ord. 21, r. 11.

(d) *Birmingham Estates Company v. Smith*, 49 L. J. 251, Ch.; 13 Ch. Div. 566; 42 L. T. Rep. N. S. 111; 28 W. R. 666; and see the form given in Appendix D., sect. 1, Rules of Court, 1883.

(e) Ord. 20, rr. 6, 7.

The rules stated *ante*, p. 55 *et seq.*, as to counsel's signature, printing, &c., apply to counter-claim.

We have already stated that where the defendant counter-claims against the plaintiff and any other person or persons who are parties to the action, he must deliver his defence and counter-claim to them as well as to the plaintiff within ten days from the delivery of the statement of claim, or from the time limited for appearance, whichever shall be last, unless the time be enlarged. (a) If the person against whom the counter-claim is made is not a party to the action he must be summoned to appear by being served with a copy of the defence, indorsed with a notice requiring him to appear within eight days from the service, and in default judgment may be given against him in his absence. The service is to be effected in the same manner as a writ of summons is served. (b)

The order does not limit a time within which the counter-claim is to be served on a person not a party to the action. No doubt, however, it should be served within the time limited for delivery of the defence and counter-claim to the plaintiff and persons parties to the action.

Any person, not a defendant to the action, who is served with a defence and counter-claim, must appear thereto as if he had been served with a writ of summons to appear in an action. (c) And he is not entitled to appear until he has been so summoned. (d)

Any person named in a defence as a party to a counter-claim thereby made may deliver a reply within the time within which he might deliver a defence if it were a statement of claim. (e)

A defendant may amend his counter-claim or set-off without leave at any time before the expiration of the time

(a) Ord. 21, rr. 6, 11.

(b) Ord. 21, r. 12.

(c) Ord. 21, r. 13.

(d) *Fraser v. Cooper, Hall, and*

*Co.*, 23 Ch. Div. 685; 52 L. J. 684, Ch.; 48 L. T. Rep. N. S. 754; 31 W. R. 714.

(e) Ord. 21, r. 14.

allowed him for answering the reply and before such answer, or, if there be no reply, then at any time before the expiration of twenty-eight days from the defence. (a)

It will be observed that a counter-claim may be amended without leave, whereas the defendant must obtain leave to amend his statement of defence, as shown *ante*, p. 75.

As to obtaining leave to amend, the time and mode of making the amendments, delivering the amended pleading, the effect of neglecting to amend, disallowing the amendments, &c., see *ante*, pp. 58, 59.

We have before stated that the court or judge may, on the application of the plaintiff, at any time before trial, or on the application of any other person made a defendant to the counter-claim before reply, order the counter-claim or set-off to be excluded, or may refuse permission to the defendant to avail himself thereof, if the claim raised by it cannot be conveniently disposed of in the pending action, but should be raised by an independent action. (b)

A counter-claim may be excluded when the subject-matter of the original action and of the counter-claim are entirely different. (c) Thus, where the original action was for assault and the counter-claim for breach of an agreement to repair, the counter-claim was excluded. (d)

Any matter in the counter-claim which is scandalous or tends to prejudice, embarrass, or delay the fair trial of the action may be struck out. (e)

The plaintiff may give the defendant notice by his reply or otherwise, in writing, that he admits the truth of the whole or any part of the case stated in the counter-claim. (f)

If the defendant sets up a counter-claim, and the plaintiff's

(a) Ord. 28, r. 3.

(b) See Ord. 19, r. 3; Ord. 21, r. 15.

(c) *Padwick v. Scott*, 2 Ch. Div. 736; 24 W. R. 723; 45 L. J. 350, Ch.; *Harris v. Gamble*, 6 Ch. Div.

748; 46 L. J. 768, Ch.; but see *Gray v. Webb*, stated *ante*, p. 77.

(d) *Lea v. Collyer*, W. N., 1876, p. 8.

(e) Ord. 19, r. 27.

(f) Ord. 32, r. 1.

action is stayed, discontinued, or dismissed, the counter-claim may nevertheless be proceeded with. (a)

If on the hearing of the action in which a set-off or counter-claim is established as a defence against the plaintiff's claim, and the balance is in favour of the defendant, the court may give judgment for the defendant for such balance, or may adjudge him such relief as he may be entitled to upon the merits of the case. (b)

When issues in fact and law are raised upon a claim or counter-claim the costs of the several issues respectively, both in law and fact, shall, unless otherwise ordered, follow the event. (c)

Where a plaintiff obtains judgment on his claim with costs, and the defendant judgment on his counter-claim with costs, the plaintiff is, in the absence of any special direction to the contrary, entitled to the general costs of the action, without any apportionment of charges common to both claim and counter-claim, and the defendant to such costs only as are properly attributable to the counter-claim, and this is so even though the balance of the litigation is in favour of the defendant. (d)

### SECTION III.

#### JOINDER BY THE DEFENDANT OF THIRD PERSONS AS PARTIES BY NOTICE.

Where a defendant claims to be entitled to contribution or indemnity over against any person not a party to the action, he may, by leave of the court or a judge, issue a notice (called the third party notice) to that effect, sealed as a writ of summons is sealed. (e)

(a) Ord. 21, r. 16; and see *McGowan v. Middleton*, 11 Q. B. Div. 464; 52 L. J. 355, Q. B.; 31 W. R. 835.

(b) Ord. 21, r. 17.

(c) Ord. 65, r. 2.

(d) *Re Brown*; *Ward v. Morse*, 23 Ch. Div. 377; 31 W. R. 936; 49 L. T. Rep. N. S. 68; 52 L. J. 524, Ch.

(e) Ord. 16, r. 48.

Notice of the application should be given to the plaintiff (a); but it seems the order may be made *ex parte*, and without notice to him. (b) The order will not be made if it would tend to prejudice or delay him. (c)

A copy of the third party notice must be filed with the proper officer at the time of sealing it, and a copy thereof served on the third person in the same way as a writ of summons is served, together with a copy of the statement of claim, or if there be no statement of claim, then together with a copy of the writ of summons. The notice must state the nature and grounds of the claim, and must be served within the time limited for delivering the defence, unless otherwise ordered by the court or a judge. (d)

Any person, not a party to the action, so served, must, if he wishes to dispute the plaintiff's claim, appear within eight days from the service; or in default thereof he is deemed to admit the validity of the judgment obtained against the defendant, whether obtained by consent or otherwise, and his own liability to contribute or indemnify to the extent of the notice. The court or a judge may, however, give leave to such person to appear after the eight days have expired, and may impose terms. And after such default by the third party, and judgment by default against the defendant, he is, after satisfaction thereof, or before by leave of the court or a judge, entitled to enter judgment against the third party to the extent of the contribution or indemnity claimed. But the court or a judge may vary or set such judgment aside upon such terms as may be just. (e)

If the third party appears pursuant to the notice, the defendant should apply to the court or a judge for directions

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(a) *Wye Valley Railway Company v. Hawse*, 16 Ch. Div. 489; 50 L. J. 75, 225, Ch.

(b) *Corrie v. Allen*, 48 L. T. Rep. N. S. 464.

(c) *Bower v. H*  
Div. 652.

(d) Ord. 16, r. 48.

(e) Ord. 16, rr. 49, 50.

as to the mode of having the question determined. And the court or judge may order the question of such liability as between the third party and the defendant to be tried, and give the third party liberty to defend the action, and may impose terms, and may order any documents to be delivered, and amendments to be made, and proceedings to be taken for having the question conveniently determined, and define the extent to which the third party is to be bound or made liable by the judgment in the action. But if the court or judge is not satisfied that there is a question proper to be tried, may order such judgment as the nature of the case requires to be entered for the defendant against the third party. (a)

The court or a judge may decide all questions of costs as between a third party and the other parties to the action, and may order any one or more to pay the costs of any other or others, or give such direction as to costs as the justice of the case may require. (b)

A third party brought in by notice may, by leave, serve a similar notice on a fourth party against whom he claims relief over. (c)

Where a defendant claims to be entitled to contribution or indemnity against any other defendant to the action, a notice may be issued and the same procedure adopted for the determination of such questions between the defendants as would be issued and taken against such other defendant if such last-mentioned defendant were a third party. But this is not to prejudice the rights of the plaintiff against any defendant in the action. (d)

It seems that leave of the court or a judge is not necessary to entitle a defendant in an action to issue a notice against a co-defendant under this rule. (e)

(a) Ord. 16, rr. 52, 53.

(b) Ord. 16, r. 54.

(c) *Fowler v. Knoop*, 36 L. T. Rep. N. S. 219; *Witham v. Vane*,

28 W. R. 276; 41 L. T. Rep. N. S. 729; 49 L. J. 242, Ch.

(d) Ord. 16, r. 55.

(e) *Towse v. Loveridge*, 49 L. T. Rep. N. S. 466; 32 W. R. 151.



## SECTION IV.

PAYMENT INTO COURT IN SATISFACTION OF  
THE PLAINTIFF'S CLAIM.

Order XXII. of the Rules of Court made in pursuance of the Judicature Acts makes provision for the payment by the defendant of money into court to relieve himself either wholly or partially of the plaintiff's claim, where that claim is for a debt or damages. It has been held that the rules under this Order do not, however, apply to ordinary Chancery actions. (a) We will, therefore, only briefly notice these rules here.

Where an action is brought to recover a debt or damages, a defendant may, before or at the time of delivering his defence, or subsequently by leave of the court or a judge, pay a sum of money into court by way of satisfaction, which admits the claim or cause of action in respect of which the payment is made; or he may, with a defence denying liability (except in cases of libel or slander), pay money into court; save that in an action on a bond under the 8 & 9 Will. 3, c. 2, payment into court is to be admissible to particular breaches only, and not to the whole action. (b)

If the payment into court is before delivery of the defence, notice thereof must be served on the plaintiff, and the notice must also specify in respect of what claim or cause of action the money is so paid in. (c)

Payment into court must be signified in the defence, and the claim of cause or action in satisfaction of which such payment is made must be specified therein. (d) And when a defence sets up a tender before action, the sum alleged to have been tendered must be brought into court. (e)

When payment into court is made before delivery of the

(a) *Nichols v. Evans*, 22 Ch. Div. 611; 48 L. T. Rep. N. S. 66; 52 L. J. 383, Ch.; 31 W. R. 412.  
(b) Ord. 22, r. 1.

(c) Ord. 22, r. 4.  
(d) Ord. 22, r. 2.  
(e) Ord. 22, r. 3.

defence, or the liability of the defendant in respect of the claim or cause of action for which the payment into court is made is not denied in the defence, or when payment into court is made with a defence of a tender, the money paid into court is to be paid out to the plaintiff on his request, or to his solicitor on the plaintiff's written authority, unless the court or a judge otherwise orders. (a)

When the payment into court is accompanied with a defence denying the defendant's liability, the plaintiff may accept, in satisfaction of the claim or cause of action in respect of which the payment was made, the sum so paid in, and is entitled to have the money paid out to him, whereupon all further proceedings in respect of such claim or cause of action, except as to costs, will be stayed; or he may refuse to accept the money in satisfaction and reply accordingly, in which case the money is to remain in court, and be subject to the order of the court or a judge. If the plaintiff so proceeding recovers less than the amount paid in, it is to be applied, so far as necessary, in satisfaction of the plaintiff's claim, and the balance, if any, is to be repaid to the defendant. And if the defendant succeeds in respect of such claim or cause of action, the whole amount is to be repaid to him. (b)

When the plaintiff accepts the money so paid in in satisfaction of the causes of action in respect of which it is paid in, he must, within four days after receipt of the notice of payment, when paid in before delivery of the defence, and if payment is first stated in the defence, then before delivering a reply, give notice of such acceptance to the defendant. And if the plaintiff accepts the sum paid in satisfaction of the entire cause of action, he may, after the expiration of four days from the notice, tax his costs, unless otherwise ordered, and if they are not paid within forty-eight hours, he may sign judgment for them. (c)

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(a) Ord. 22, r. 5.

(b) Ord. 22, r. 6.

(c) Ord. 22, r. 7.

When money is to be paid into court in an action to recover a debt or damages, or to a security for costs account when a discovery is sought under Order XXXI., rule 26, the money may be lodged without an order, on a request by the person who is to make the payment containing a statement of the circumstances under which the money is to be lodged, and a direction issued thereon by the paymaster to the bank, as fully shown, *post*, p. 87. The money is to be paid out in actions for debt or damages on a direction issued by the paymaster upon request; and if paid in on a security for costs account, it is paid out on the certificate of the taxing officer. (a)

A plaintiff may, in answer to a counter-claim, pay money into court in satisfaction thereof, subject to the like conditions as upon payment into court by a defendant. (b)

## SECTION V.

### PAYMENT OR TRANSFER INTO COURT TO ABIDE THE EVENT OF THE ACTION.

In actions in the Chancery Division of the High Court payment of money into court is usually ordered to abide the event or result of the action in which the order is made.

The ordinary cases of applications for this purpose are in actions against trustees or executors, or in actions between partners when money appears to be in their hands either by admissions in the defence or on the chief clerk's certificate. Also where money is in the hands of factors or stakeholders who do not claim any title to it, the court will, for security, take possession of it until it adjudicates upon the right. (c)

Where the plaintiff can, therefore, see from the defendant's defence that he holds a definite sum of money upon

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(a) See Funds Rules, 1884, rr. 30, 44.

(b) See Ord. 22, r. 9.

(c) Ayck. Ch. Pr. 444, 9th ed.

trust, or as an executor, partner, stakeholder, or factor to the effect above stated, the plaintiff is entitled to have this money brought into court; obtaining an order for this purpose by motion on notice given as soon as the defence is delivered, without waiting until judgment is obtained. And it has been recently held in an administration action against an executor, where, before pleadings delivered, notice of motion was served for payment of money into court, part of the testator's estate, and it was shown by affidavit that it had been received by the executor, and he did not appear on the motion, that he not having disputed the affidavit was a sufficient admission that the money was in his hands, and that he be ordered to pay it into court. (a) The admission on the defendant's answer need not therefore necessarily be waited for before making an application for payment into court.

The court has also jurisdiction to make an order of this nature on the plaintiff, as in an interpleader action; for here the statement of claim contains a submission on the part of the plaintiff to pay in the sum which is claimed from him by the defendants. The remarks above made apply to the transfer of stock into court. The payment or transfer into court does not in any degree affect the rights of the persons beneficially entitled to the fund, which is afterwards distributed among them according to their respective interests, which will be defined by the judgment. (b)

The order is to be drawn up and passed by the registrar. All money or securities to be paid or deposited in court are to be paid or deposited at the Bank of England (Law Courts Branch), and placed in the books of the bank to the account of the Paymaster-General, for and on behalf of the Supreme Court; and the bank is to give a receipt to the person making the payment or deposit. And all securities to be transferred into court are to be transferred to the

(a) *Freeman v. Cox*, 8 Ch. Div. 148.

(b) See *Noble v. Stow*, 7 W. R. 709.

said account in the books of the bank, or other company in whose books the securities are registered. (a)

Every order directing funds (that is, money or securities) to be lodged (that is, paid, transferred, or deposited) in court must have annexed thereto, as part thereof, a lodgment schedule, containing the title of the cause or matter, the date of the order, and the title of the ledger credit to which the funds are to be placed; also, in a tabular form, the name of the person who is to lodge the funds, and the amount of money and description of the securities. This schedule may direct the investment and accumulation of the funds. (b) It must also contain the whole of the instructions intended by the Order to be acted upon by the Paymaster-General, and all necessary particulars, &c. These instructions are not to be set out in the order, but only to be referred to therein. (c)

The registrar is to cause a duplicate of the order, and a further copy of the schedule thereto, to be made, and the original order and copy schedule, duly sealed, must be transmitted by him to the clerks of entries with the duplicate order. The duplicate order is retained and filed of record by such clerks, and the original order and copy schedule, examined and stamped and marked with a reference to the record, are returned to the registrar to be delivered out to the solicitor having the carriage of the order, who must forthwith leave the copy schedule only at the pay office, which is a sufficient authority to the paymaster to act thereon. (d)

Upon receipt of the copy schedule the paymaster will issue a direction for the lodgment upon a request, which must state the name of the person by or on whose behalf the funds are to be lodged, the ledger credit in the pay office books to which the funds are to be placed, and the date of

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(a) Funds Rules, 1884, rr. 23, 29; 46 & 47 Vict. c. 29, ss. 1, 2.  
(b) Funds Rules, 1884, r. 5.

(c) Funds Rules, 1884, rr. 10, 11.  
(d) Funds Rules, 1884, rr. 24, 25.

the authority or certificate, if any, in pursuance of which the funds are to be lodged. This request may be sent by post, and the direction may, if desired, be also sent by post to the address given. (a)

When funds have been received by the bank, or securities have been transferred in the books of the bank or other company to the pay office account in accordance with a direction, the bank or other company must forthwith send such direction to the paymaster, with a certificate thereon that the funds have been received or transferred. (b) The paymaster thereupon is to file at the central office a certificate of the lodgment, and state therein the ledger credit to which such funds have been placed in the books at the pay office; and an office copy of such certificate of the paymaster is evidence of the lodgment. (c)

All money to be lodged in court in the Chancery Division is to be placed on deposit without a request, with certain exceptions, as when the amount is under 10*l.*; or when a request that the money shall not be placed on deposit is signed by a solicitor acting on behalf of a person claiming to be entitled thereto is left at the pay office. And money arising by the sale, conversion, or payment off of securities in court in the Chancery Division are only to be placed on deposit upon a request. (d)

As to investment of funds, see Order XXII., rule 17, and Funds Rules, 1884, rules 69 to 75; and as to exchange or conversion, see Order XXII., rule 18, and Funds Rules, 1884, rules 86 to 88.

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(a) Funds Rules, 1884, rr. 30, 35.

(b) Funds Rules, 1884, r. 37.

(c) Funds Rules, 1884, r. 38.

(d) Funds Rules, 1884, rr. 76, 77.

## SECTION VI.

## PAYMENT OR TRANSFER OUT OF COURT.

With the exception of money paid into court in actions for debt or damages, or to a security for costs account (see *ante*, pp. 84, 86), funds in court cannot, as a rule, be paid, delivered, or transferred out of court, nor invested, or sold, or carried over, without an order. (a)

Every order which directs funds in court to be paid, sold, transferred, or delivered to any person, or carried over to another ledger credit, must have annexed thereto as part thereof a payment schedule, to contain similar information as the lodgment schedule contains, (b) (see *ante*, p. 88) and the instructions to the paymaster are likewise to be solely contained therein. (c)

The solicitor having the carriage of the order must forthwith leave a duly authenticated copy of the payment schedule at the pay office, as provided in rule 24, stated *ante*, p. 88. And upon receipt of the copy order and schedule the paymaster is to prepare a direction for the payment of the money or for the delivery of the securities out of court, and deliver it out on the personal application of the person entitled. Transfers of securities out of court, carrying over funds and investments in pursuance of an order, are to be made by the paymaster upon receipt of the necessary authority and information. (d)

Any person residing within the United Kingdom who is entitled under an order to any dividend, annuity, or other periodical payment, or entitled to any other payment not exceeding 500*l.*, may obtain a remittance thereof by post at his own risk by sending to the paymaster a request, attested by two witnesses, of whom one is to be a justice of

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(a) Funds Rules, 1884, rr. 44, 45.

(b) Funds Rules, 1884, r. 6.

(c) Funds Rules, 1884, r. 10.

(d) Funds Rules, 1884, rr. 46, 47.

the peace, a commissioner to administer oaths, or a clerk in holy orders, or a notary public.

Upon receipt of this request (and, if necessary, of evidence of the fulfilment of any conditions), the paymaster will send by post to the address given in the request a cheque or other direction for obtaining payment, which must be crossed. The paymaster may refuse to comply with such request if he see reason for so doing. (a)

As to fulfilment of conditions previous to payment. The most common condition of payment is, that the payee should be alive, and under rule 95 the paymaster may act on a declaration signed by the solicitor of the payee, or by the payee, attested in the same manner as the request for payment is to be attested.

An affidavit may, however, still be required as evidence.

The paymaster's direction, duly countersigned, is sufficient authority to the bank for payment of the money, or to authorise the bank or company to transfer or deliver securities standing to the pay office account. And the direction or document by which the payment is effected, when indorsed or signed by the payee or his lawful attorney, is a good discharge to the paymaster. (b)

Payments to official persons having an account at the bank may be made by transfer, on a requisition to that effect. (c)

In future, when securities in court are directed to be transferred, delivered out, or carried over, subsequent dividends will be paid and carried over also, unless otherwise ordered; and so, in like manner, when the dividends have been brought into account and invested before payment, the securities on which the dividends are invested will be transferred to the person who was entitled to the dividends, or carried over to the ledger credit to which the securities from which they arose have been carried over, unless otherwise directed. (d)

(a) Funds Rules, 1884, r. 48; 46  
& 47 Vict. c. 29, s. 6.

(b) Funds Rules, 1884, rr. 49, 50.

(c) Funds Rules, 1884, r. 52.

(d) Funds Rules, 1884, rr. 55, 56.



If funds in court are ordered to be paid out, transferred, or delivered to a woman who is at the time single, but marries before payment, &c., upon an affidavit of the woman and her husband that no settlement or agreement for a settlement has been made either before or since the marriage; or, if there be any settlement or agreement for a settlement, then upon an affidavit identifying it and stating that no other settlement or agreement for a settlement has been made; also an affidavit of their solicitor stating that he has perused the settlement or agreement for such settlement, and that to the best of his judgment such funds are not subject to the trusts of such settlement or agreement for a settlement or affected thereby, such funds are to be paid, transferred, or delivered to such woman, without the intervention or concurrence of her husband, in the same manner as if she had remained unmarried. (a)

On proof of the death of the person to whom the funds are to be paid out, transferred, or delivered as absolute owner by an order, then, unless the order otherwise directs, the funds may be paid, &c., to the legal personal representatives of the deceased person, or to the survivor of them. (b)

The proofs required are probate of the will of the deceased or letters of administration to his effects, (c) a certificate of burial, or an official extract from the register of deaths, and an affidavit of identity. (d)

No funds, however, will be paid out, &c., to the legal personal representatives of a person under any probate or letters of administration purporting to be granted after the expiration of six years from the date of the order directing payment, &c. (e)

If legacy or succession duty is stated to be payable on the

(a) Funds Rules, 1884, r. 61.

(b) Funds Rules, 1884, r. 62.

(c) Probate issued by a colonial court is not sufficient. *Ex parte Limehouse Board of Works*; *Re*

*Vallance*, 24 Ch. Div. 177; 32 W. R. 387.

(d) 1 Alph. Pr. 660, 668.

(e) Funds Rules, 1884, r. 65.

funds to be paid out, transferred, or delivered, the paymaster, before acting upon the order, will require the production of the official receipt for such duty, or a certificate from the proper officer of the payment thereof, or that no such duty is payable. (a)

Income tax is also to be deducted by the paymaster in drawing for dividends. (b)

## SECTION VII.

### WITHDRAWAL OF DEFENCE.

The court or a judge may, on the application of the defendant, either before, or at, or after the hearing or trial, on such terms as to costs or otherwise as may seem just, order the whole or any part of the alleged grounds of defence or counter-claim to be withdrawn or struck out; but it is not competent to a defendant to withdraw his defence or any part thereof without such leave. (c)

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(a) Funds Rules, 1884, r. 66.  
(b) Funds Rules, 1884, r. 68.

(c) Ord. 26, r. 1.

## CHAPTER VIII.

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### THE PLAINTIFF'S PROCEEDINGS AFTER DEFENCE.

THE defendant having delivered his defence, several different modes of proceeding are open to the plaintiff. (1) He may reply, dealing specifically with any fresh allegations which may have been raised by the defence; or (2) he may simply join issue at once upon the defence, in which case the pleadings end; or (3) if he considers the defence set up a sufficient answer to his claim he may discontinue his action.

### SECTION I. REPLY BY PLAINTIFF.

The plaintiff by his reply may join issue upon the defence. Such joinder of issue operates as a denial of every material allegation of facts in the pleading upon which issue is joined, but it may except any facts which he may be willing to admit, and it then operates as a denial of the facts not so admitted; (a) or he may reply without joining issue.

The plaintiff must deliver his reply (if any) within twenty-one days after the defence, or the last of the defences, has been delivered, unless the time be extended by the court or a judge. (b) The time for delivering, &c., any pleading, answer, or other document may, however, be enlarged by

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(a) Ord. 19, r. 18.

(b) Ord. 23, r. 1; and see *Eaton*

| *v. Storer*, 22 Ch. Div. 91; 31 W. R.  
488; 48 L. T. Rep. N. S. 204.

consent in writing, without any application to the court or a judge. (a)

If the plaintiff does not deliver a reply within the period allowed for that purpose, the pleadings are thereupon deemed to be closed, and all the material statements of fact in the pleading last delivered are to be deemed to have been denied and put in issue. (b)

New claims cannot be raised in the reply, except by way of amendment, nor must it contain any allegation of fact inconsistent with the plaintiff's previous pleading. (c) But the court or a judge may allow the plaintiff to alter his reply by way of amendment; (d) and everything which was formerly alleged by way of new assignment may now be introduced by amendment of the statement of claim, or by way of reply; and no new assignment is to be used. (e)

If the defendant has set up any counter-claim, and the plaintiff wishes to deny the facts therein alleged, he does so by his reply, and such reply is subject to the rules applicable to statements of defence. (f)

The plaintiff in his reply cannot deny generally, but must deal specifically with each allegation of fact of which he does not admit the truth (except damages); and this must not be done evasively, but the point of substance must be answered. (g)

If after a statement of defence has been delivered any ground of defence arises to any set-off or counter-claim alleged therein by the defendant, it may be raised by the plaintiff in his reply, either alone or with any other ground of reply. (h)

As to the title of the court and cause, marking, allegations of facts, denials, admissions, notice, &c., paragraphs, figures, signature of counsel, delivery, &c., see *ante*, p. 55 *et seq.*

(a) Ord. 64, r. 8.

(b) Ord. 27, r. 13.

(c) Ord. 19, r. 16; *Williamson v. London and North-Western Railway Company*, 12 Ch. Div. 787; 27 W. R. 724; 48 L. J. 559, Ch.

(d) Ord. 19, r. 16; Ord. 28, rr. 1, 6.

(e) Ord. 23, r. 6.

(f) Ord. 23, r. 4; *Street v. Crump*, 32 W. R. 89; 49 L. Rep N. S. 397.

(g) See Ord. 19, rr. 17, 19.

(h) Ord. 24, r. 1.

As to amendments generally, the mode of making the application and making the amendments, delivering the amended pleading, and the effect of neglecting to amend, and as to striking out matter which is scandalous or tends to embarrass the fair trial of the action, see *ante*, pp. 58, 69.

If the plaintiff has delivered his reply, or the time limited for delivering it has expired, and a ground of defence to a set-off or counter-claim then arises, he may, within eight days after such defence arose, or at any subsequent time by leave of the court or a judge, deliver a further reply setting it forth. (a)

## SECTION II.

### REPLY BY PERSONS OTHER THAN THE PLAINTIFF.

Any person named in a defence as a party to a counter-claim thereby made, may deliver a reply within ten days from the delivery to him of the counter-claim, or from the time limited for appearance, whichever shall be last, unless this time be extended by the court or a judge. (b)

## SECTION III.

### PLEADINGS SUBSEQUENT TO REPLY.

It will seldom happen that there will be any pleadings after reply other than a joinder of issue. And no pleading subsequent to reply other than a joinder of issue can be pleaded without leave of the court or a judge, granted upon such terms as may be imposed. Every pleading subsequent to reply must be pleaded within four days after the delivery of the previous pleading, unless this time be enlarged. (c)

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(a) Ord. 24, r. 2.  
(b) Ord. 21, rr. 6, 14.

(c) Ord. 23, rr. 2, 3; Ord. 64,  
r. 8.

## SECTION IV.

JOINDER OF ISSUE AND CLOSE OF THE  
PLEADINGS.

The plaintiff by his reply may join issue upon the defence, and each party in his pleading, if any, subsequent to reply, may join issue upon the previous pleading. Such joinder of issue operates as a denial of every material allegation of facts in the pleading upon which issue is joined; but it may except any facts which the party is willing to admit, and then it operates as a denial of the facts not so admitted. (a)

As soon as any party has joined issue upon the preceding pleading of the opposite party simply without adding any further or other pleading thereto, or has made default as stated in Order XXVII, r. 13 (given *ante*, p. 95), the pleadings as between such parties are to be deemed to be closed. (b)

Where in any cause or matter it appears to the court or a judge that the issues of fact in dispute are not sufficiently defined, the parties may be directed to prepare issues, and such issues will, if the parties differ, be settled by the court or a judge. (c)

And where the parties to a cause or matter are agreed as to the questions of fact to be decided between them, they may, after writ issued and before judgment, by consent and order of the court or a judge, state such questions for trial in an issue without formal pleadings, which may be entered for trial and tried in the same manner as any issue joined in an ordinary action. (d)

(a) Ord. 19, r. 18.

(b) Ord. 23, r. 5.

(c) Ord. 33, r. 1.

(d) Ord. 34, r. 9.

## SECTION V.

## DISCONTINUANCE.

It may happen that the plaintiff considers it prudent to discontinue his action entirely, or to withdraw some parts only of his statement of claim. Up to a certain period of the action this may be done without leave, afterwards leave is necessary before this can be done.

The plaintiff, at any time before receipt of the defendant's defence, or after its receipt, but before taking any proceeding in the action (save an interlocutory application), may by written notice wholly discontinue his action against all or any of the defendants, or withdraw any parts of his alleged cause of action. The defendant is thereupon entitled to tax his costs of the whole action, or of the matters withdrawn, as the case may be, and to sign judgment for such costs if not paid within four days after taxation. (a)

Such discontinuance or withdrawal is not a defence to any subsequent action, but if brought before payment of the costs of the discontinued action, for the same, or substantially the same, cause of action, the subsequent action may be stayed until the costs are paid. (b)

The form of the notice to discontinue is not material. Where the plaintiff's solicitors wrote to the defendant's solicitor stating "We are instructed to proceed no further with the action; and presume you do not want a formal order dismissing it;" this was held a sufficient notice. (c)

If the plaintiff wishes to discontinue his action, or to withdraw part of his claim after the proceedings above detailed have been taken, he can only do so by leave of the court or a judge, which may be granted before, or at or after the

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(a) Ord. 26, rr. 1, 3.

(b) Ord. 26, rr. 1, 4.

(c) *The Pomerania*, 4 Pr. Div.

195; 48 L. J. 55, P. & D.; 39 L. T. Rep. N. S. 642.

hearing or trial, on such terms as to costs or otherwise as may be just. (a)

Leave will not be given if it would deprive the defendant of any advantage to which he is properly entitled: as if the case has been referred to an arbitrator who has found in defendant's favour. (b)

As before shown (*ante*, p. 93) leave may also be given to a defendant to withdraw or strike out the whole or any part of the alleged grounds of his defence or counter-claim, upon such terms as to costs or otherwise as may be just. (c)

So when a cause has been entered for trial it may be withdrawn by either plaintiff or defendant upon producing to the proper officer a written consent signed by the parties. (d)

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(a) Ord. 26, r. 1.	L. T. Rep. N. S. 194; 27 W. B. 350.
(b) <i>Stahlschmidt v. Walford</i> , 4 Q. B. Div. 217; 48 L. J. 384, Q. B.; 40	
	(c) Ord. 26, r. 1. (d) Ord. 26, r. 2.



## CHAPTER IX.

## MODES OF RAISING POINTS OF LAW.

FORMERLY, if a pleading on its face showed no grounds for the interference of the court in favour of the party pleading it, it might have been demurred to. (a)

The word demurrer is derived through the Norman French from the Latin word *demoror* to retard or delay, and signified a stoppage in pleading. Demurrers have not been much countenanced of late, and by order XXV., rule 1, it is ordered that "no demurrer shall be allowed."

Points of law may now be raised (1) by the pleading of any party; or (2) may be stated by the parties to the action in a special case.

## 1. BY PLEADING IN LIEU OF DEMURRER.

Any party is to be entitled to raise by his pleading any point of law, and the point so raised is to be disposed of by the judge who tries the cause at or after the trial; but by consent of the parties, or by order of the court or a judge on the application of either party, the same may be set down for hearing and disposed of at any time before the trial. (b)

And if, in the opinion of the court or a judge, the decision of such point of law substantially disposes of the whole action, or of any distinct cause of action, ground of defence, set off, counter-claim, or reply therein, the court or judge may thereupon dismiss the action or make such other order as may be just. (c)

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(a) See Mit. Pl. 99; *Bidder v. McLean*, 20 Ch. Div. 512; 46 L. T. Rep. N. S. 70; 30 W. R. 529.

(b) Ord. 25, r. 2.

(c) Ord. 25, r. 3.

And if any pleading discloses no reasonable cause of action or answer, the court or judge may order it to be struck out, and in such case, or if the action or defence is shown by the pleadings to be frivolous or vexatious, the action may be ordered to be stayed or dismissed, or judgment to be entered, as may be just. (a)

But applications under rule 4 of Order XXV. are not intended to take the place of demurrers when there is any question of law to be argued, but are only intended to get rid of frivolous actions. The party should raise the point of law by his pleading under rule 2 of this order. (b)

And as before stated (*ante*, p. 70) no action or proceeding is to be open to objection because a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not. (c)

## 2. SPECIAL CASE.

Special cases were introduced into Chancery by the 13 & 14 Vict. c. 35, passed in 1850 at the instance of the late Lord Justice Turner, and were framed to meet cases where no relief was claimed, but the opinion of the court was sought upon the construction of some document. A special case may still be stated as provided by the above Act. (d)

The parties to any cause or matter may concur in stating the questions of law arising therein in the form of a special case for the opinion of the court. Such special case must be divided into paragraphs, numbered consecutively, and concisely state the necessary facts and documents. The court and the parties may, on the argument of the case, refer to the whole contents of such documents, and the court may draw from the facts and documents so stated any inference, whether

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(a) Ord. 25, r. 4.

(b) *Parsons and another v. Burton*, W. N. Dec. 1283, p. 215.

(c) Ord. 25, r. 5.

(d) Ord. 34, r. 8.

of fact or law, which might have been drawn therefrom if proved at a trial. (a)

So a special case may be stated by order. For if it appears to the court or a judge that there is in any cause or matter a question of law, which it would be convenient to have decided before any evidence is given or any issue of fact is tried, or any reference to a referee or arbitrator made, the court or a judge may order such question of law to be raised for the opinion of the court, either by special case or otherwise, and all such further proceedings as are rendered unnecessary by the decision of such question of law may thereupon be stayed. (b)

The parties to a special case may enter into a written agreement that on the judgment of the court being given, a sum of money, either fixed by the parties or ascertained by the court, or as the court directs, shall be paid by one of the parties to the other, either with or without costs, and judgment may be entered accordingly, and execution forthwith issued thereon, unless otherwise agreed, or stayed on appeal. (c)

The plaintiff must cause the special case to be printed, and it must be signed by the parties or their counsel or solicitors, and be filed by the plaintiff. (d)

The court or a judge may amend a special case; (e) but an amendment will not be ordered at the instance of one party so as to raise a question the other party refuses to consent to raise, unless the point has been omitted by error or through fraud. (f)

Either party may enter a special case for argument by delivering to the proper officer a memorandum of entry. But if a married woman (not being a party thereto in respect of her separate property or of any separate right of action

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(a) Ord. 34, r. 1.

(b) Ord. 34, r. 2.

(c) Ord. 34, r. 6.

(d) Ord. 34, r. 3.

(e) Ord. 28, rr. 1, 6, 12.

(f) *Mersey Docks Commissioners*  
v. *Jones*, 29 L. J. 239, C. P.

by or against her), or an infant, or person of unsound mind not so found by inquisition is a party, such special case cannot be set down for argument without leave of the court or a judge, which will only be granted when sufficient evidence is produced showing that the statements contained in such special case, so far as they affect the interests of such married woman, infant, or person of unsound mind are true; and a copy of this order must be produced to the officer at the time the memorandum of entry is delivered. (a)

The plaintiff must deliver a printed copy of the special case for the use of the judge on the argument. (b)

Unless all the parties agree that a special case be heard before a divisional court, it will be heard and determined by a single judge in court. (c)

It seems that the action should be set down on motion for judgment at the time the special case is entered for argument, if the answers to the special case in fact dispose of the action, so that the answers can be taken in the form of a judgment. (d)

As to the power of a referee to state a special case, see Order XXXVI., r. 52; and as to the power of an arbitrator to do so, see 17 & 18 Vict. c. 125, ss. 4, 5; and as to the power of a judge in interpleader cases to state a special case for the opinion of the court, see Ord. LVII., r. 9, *et post*.

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(a) Ord. 34, rr. 4, 5.

(b) Ord. 34, r. 3.

(c) 39 & 40 Vict. c. 59, s. 17;  
Ord. 59, r. 1 (h).

(d) *Harrison v. The Cornwall  
Minerals Railway Company*, 16 Ch.  
Div. 66; 43 L. T. Rep. N. S. 496;  
49 L. J. 834, Ch.; 29 W. R. 258.

## CHAPTER X.

## DISCOVERY.

As before stated (*ante*, p. 3), the Court of Chancery has from the earliest times exercised a jurisdiction by enforcing a discovery by the oath of the party interrogated of the truth of the matters in question in a suit.

Either party may now compel a discovery from the opposite party (1) of facts in the knowledge of the opposite party, and (2) of documents in his possession or power.

## SECTION I.

## INTERROGATORIES AS TO FACTS.

In any action where relief by way of damages or otherwise is sought on the ground of fraud or breach of trust, the plaintiff may at any time *after* delivering his statement of claim, and a defendant may, at or after the time of delivering his defence, without any order for that purpose, deliver written interrogatories for the examination of the opposite party; and in every other cause or matter the plaintiff or defendant may, by leave of the court or a judge, so deliver interrogatories. (*a*)

If there are several parties to the action, the interrogatories, when delivered to any one or more of such parties, must have a note at the foot thereof stating which of such interrogatories each of such persons is required to answer, but no party can deliver more than one set of interrogatories to the same party without an order for that purpose; and

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(a) Ord. 31, r. 1.

interrogatories which do not relate to any matters in question in the cause or matter will be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness. (a)

When leave to exhibit interrogatories is sought, the court or judge in deciding thereon is to take into account any offer which may be made by the party sought to be interrogated to deliver particulars, or to make admissions, or to produce documents relating to the matters in question, or any of them. (b) Upon an application for leave to deliver interrogatories, the judge will not decide as to the relevancy of particular interrogatories. (c)

Persons made third parties by counter-claim cannot interrogate a co-defendant under the counter-claim, they not being "opposite parties." (d)

It will be noticed that leave of the court or a judge is now necessary before interrogatories can be delivered in any cause or matter, except "where relief by way of damages or otherwise is sought on the ground of fraud or breach of trust;" (e) and, as will be fully detailed hereafter, the party seeking such discovery must, unless otherwise ordered, pay into court to a "security for costs account" the sums mentioned in rule 26 of Order XXXI.

In actions in the Chancery Division interrogatories might, under the former practice, be delivered before the statement of defence; (f) but it was held by the Queen's Bench Division that, if the plaintiff did so deliver them, they might be struck out as not being sufficiently material at that stage of the action. (g)

Each party to an action is entitled to a discovery of all matters relevant and material to his own, and not to the case

(a) Ord. 31, r. 1.

(b) Ord. 31, r. 2.

(c) *Hall v. Liardet*, W. N. 1883, p. 175.

(d) *Molloy v. Kilby*, 15 Ch. Div. 162; 29 W. R. 127.

(e) Ord. 31, r. 1.

(f) See *Harbord v. Monk*, 9 Ch. Div. 616; 27 W. R. 164.

(g) *Mercier v. Cotton*, 1 Q. B. Div. 442; 24 W. R. 566; 35 L. T. Rep. N. S. 79; 46 L. J. 184, Q. B.

of the opposite party. (a) This rule applies to an action for the recovery of land. In an action for the recovery of land, the plaintiff claimed as assignee of a co-heiress of a deceased intestate owner of the land, and the defendant relied on his possession, and also set up the Statute of Limitations; and it was held by the House of Lords that the plaintiff was entitled to interrogate the defendant as to matters relevant to the pedigree and heirship of his assignor, and as to alleged admissions by the defendant that his possession of the land was as trustee for the intestate and her heirs, even though the plaintiff might have other means of proving the facts inquired after; and that the defendant must answer the interrogatories in substance, subject to any privilege against particular discovery which he might be entitled to claim. (b)

Where a plaintiff is bound to answer he comes within the general rule, and must answer fully, even if the answers tend to destroy his claim. (c)

Leave will not be granted to a defendant to interrogate a plaintiff before the delivery of the statement of defence, except under special circumstances. (d)

Nor will leave be granted to either party to deliver interrogatories after the close of the pleadings without satisfactorily accounting for the delay. (e)

If a body corporate or a joint stock company, or body of persons empowered by law to sue or be sued either in its own name or the name of an officer or other person, is a party to an action, the opposite party may apply for an order allowing him to deliver interrogatories to any member or officer of

(a) See Wig. Dis. 14, 2nd ed.; *Horton v. Bott*, 2 H. & N. 249; 26 L. J. 267, Ex.; *Saunders v. Jones*, 7 Ch. Div. 435; 47 L. J. 440, Ch.; 37 L. T. Rep. N. S. 769; 26 W. R. 226; *Lyell v. Kennedy*, 8 App. Cas. 217; 31 W. R. 618; 52 L. J. 385, Ch.; 48 L. T. Rep. N. S. 585.

(b) *Lyell v. Kennedy*, *supra*.

(c) *Hoffman v. Postill*, 4 Ch.

App. Cas. 673. As to a discovery from an agent, see *Ramsbottom v. Shropshire Union Railway and Canal Company*, 24 Ch. Div. 110; 32 W. R. 122.

(d) *Disney v. Longbourn*, 2 Ch. Div. 704; 45 L. J. 532, Ch.; 35 L. T. Rep. N. S. 301; 24 W. R. 663.

(e) *Ellis v. Ambler*, 25 W. R. 557; 36 L. T. Rep. N. S. 410.

such corporation, &c. (a) It is, therefore, improper to make the officer of the company against whom no relief is claimed a defendant to the action, as he, or any member of the company may by order be examined on interrogatories under the above rule. (b) And where a member of a company is examined on interrogatories he cannot refuse to file his affidavit in answer until he has been paid his costs. (c)

The party to whom the interrogatories are delivered may, within seven days after delivery, apply for an order to set aside any interrogatories on the ground that they have been exhibited unreasonably or vexatiously; or to strike out any interrogatories on the ground that they are prolix, oppressive, unnecessary, or scandalous. (d) And as before stated, interrogatories which do not relate to the matters in question in the cause or matter are to be deemed irrelevant. (e) If a judge thinks that interrogatories as a whole are vexatious or unreasonable, he may strike out the whole of them without sifting the mass for the purpose of saving those questions which may be reasonable and fit. (f)

The interrogatories must be answered by affidavit, to be filed within ten days from the service of the copy of the receipt of payment into court of the sum for security for costs (see *post*, p. 110), or within such other time as a judge may allow. (g) If the affidavit in answer exceeds ten folios it must, unless otherwise ordered, be printed. (h)

Any objection to answer interrogatories on the ground that they are scandalous or irrelevant, or not *bonâ fide* for the purpose of the cause or matter, or are not sufficiently material at that stage, or on any other ground, may be taken in the affidavit in answer. (i)

(a) Ord. 31, r. 5.

(b) *Wilson v. Church*, 9 Ch. Div. 552; 39 L. T. Rep. N. S. 413; 26 W. R. 735.

(c) *Berkeley v. Standard Investment Company*, 13 Ch. Div. 97; 49 L. J. 1, Ch.; 41 L. T. Rep. N. S. 374; 28 W. R. 125.

(d) Ord. 31, r. 7; *Grumbrecht v. Parry*, 49 L. T. Rep. N. S. 570.

(e) Ord. 31, r. 1.

(f) *Cawley v. Burton*, 32 W. R. 33.

(g) Ord. 31, r. 8; and see r. 26, *et post*.

(h) Ord. 31, r. 9.

(i) Ord. 31, r. 6.



Fishing or obviously improper interrogatories may be left unanswered without any reason being given. (a)

A party interrogated may refuse to answer on the ground that the discovery sought relates exclusively to his own title; (b) so as a general rule, discovery may be resisted on the ground that, if given, it may subject such party to pains and penalties, or to some forfeiture, or to Ecclesiastical censures. (c) Communications between solicitor and client, and the town agent of the solicitor and counsel, relating to the matters in question in the action, are privileged and cannot be called for. The privilege is that of the client and not of the solicitor. (d)

No exceptions can be taken to the affidavit in answer to interrogatories, but the sufficiency or otherwise of the affidavit objected to, is to be determined by the court or a judge on motion or summons. (e)

If the party interrogated omits to answer or answers insufficiently, the party interrogating may apply to the court or a judge for an order requiring him to answer, or to answer further, as the case may be, either by affidavit or *vivâ voce*, as may be ordered. (f) And it may be made a part of the order that the costs of and occasioned by the application be paid by such party. (g)

The application should as a rule be made by summons at chambers, which should specify the particular interrogatories, or parts of interrogatories, to which a further answer is required. (h)

(a) *Smith v. De Berg*, 36 L. T. Rep. N. S. 471; 25 W. R. 606.

(b) See Wig. Dis. 14, 2nd ed.; *Horton v. Bott*, 2 H. & N. 249; 26 L. J. 267, Ex.; *Kearsley v. Phillips*, 10 Q. B. Div. 36, 465; 31 W. R. 467; 48 L. T. Rep. N. S. 468; *Attorney-General v. Emerson*, 10 Q. B. Div. 191; 31 W. R. 191; 51 L. J. 67, Q. B.; 48 L. T. Rep. N. S. 18.

(c) Wig. Dis. 80, &c., 2nd ed.; *Sichel & Ch. Dis. 60 et seq.*; *Huntings v. Williamson*, 52 L. J. 400,

Ch.; 31 W. R. 924; 48 L. T. Rep. N. S. 581.

(d) *Sichel & Ch. Dis. 63, 70.*

(e) Ord. 31, r. 10.

(f) Ord. 31, r. 11.

(g) *Vicary v. Great Northern Railway Company*, 9 Q. B. Div. 168; 51 L. J. 462, Q. B.

(h) *Chesterfield Colliery Company v. Black*, 24 W. R. 783; *Ansty v. Woolwich Subway Company*, 11 Ch. Div. 439; 40 L. T. Rep. N. S. 393; 48 L. J. 776, Ch.; 27 W. R. 575.

If a party from whom discovery is sought objects to the same, and it is satisfactorily shown that the right to the discovery depends on the determination of any issue or question in dispute in the cause or matter, or that it is desirable that any issue or question in dispute in the cause or matter should be determined before deciding upon the right to discovery, the court or a judge may order that such issue or question be determined first, and reserve the question as to discovery. (a)

When an order to answer interrogatories is made, and the party fails to comply with it, he is liable to an attachment; and if the party making default is a plaintiff, he is liable on an order of the court or a judge to have his action dismissed for want of prosecution; and if a defendant, by a like order, to have his defence, if any, struck out, and be placed in the same position as if he had not defended. (b)

The power of the court under this rule is discretionary. (c)

Service of an order for interrogatories or discovery made against a party on his solicitor, is sufficient service to found an application for an attachment for disobedience thereto. But such party may show in answer to the application that he has had no notice or knowledge of the order. (d) And if the solicitor neglects, without reasonable excuse, to give notice thereof to his client, he is liable to an attachment. (e)

Any one or more of the answers, or any part of an answer to the interrogatories, may be used in evidence at the trial without putting in the others or the whole answer; but if the judge is of opinion that any other answer is so connected with those put in that they should not be used without it, he may direct accordingly. (f)

As to costs: it is now provided that in every cause or matter the costs of discovery by interrogatories or otherwise,

(a) Ord. 31, r. 20.

(b) Ord. 31, r. 21.

(c) *Hartley v. Owen*, 34 L. T. Rep. N. S. 752.

(d) Ord. 31, r. 22; *Re Mulcaster*, 47 L. J. 609, Ch.; 26 W. R. 434.

(e) Ord. 31, r. 23.

(f) Ord. 31, r. 24.

are, unless otherwise ordered by the court or a judge, to be secured in the first instance by the party seeking discovery, before delivering the interrogatories, &c., paying into court (in the mode pointed out *ante*, p. 86) to a separate account in the action to be called "Security for costs account," to abide further order, the sum of 5*l.*, and if the number of folios exceeds five, the further sum of 10*s.* for every additional folio. And such party must with his interrogatories or order serve a copy of the receipt for the payment into court, and the time for answering is to commence from the date of such service: and the opposite party is not to be required to answer unless and until such payment has been made. (a) And if interrogatories are delivered to more than one defendant, the prescribed deposit is to be made in respect of each set of interrogatories. (b)

It will be observed this deposit is to be made "unless otherwise ordered by the court or a judge." And it has been held that the court or a judge is not bound to make an order dispensing with this deposit merely on the ground that the parties have assented to such an order being made. (c)

The sum paid into court is to be allowed as part of the costs of the party seeking the discovery where, and only where, such discovery appears to the judge at the trial, or if there is no trial, to the court or a judge, or to the taxing officer, to have been reasonably asked for. (d) But the sum paid in as security, is security for the general costs of the cause and not of discovery only. (e)

Unless the court or a judge at or before the trial otherwise orders, the amount standing to the credit of the "Security for costs account," is, after the cause or matter is finally disposed of, to be paid out to the party who paid it in on the taxing officer's certificate on his request, or on his written

(a) Ord. 31, rr. 25, 26.

(b) *Smith v. Reed and others*, W. N., Dec. 1883, p. 196.

(c) *Aste v. Stumore*, 49 L. T. Rep. N. S. 742; 32 W. R. 219, C. A.

(d) Ord. 31, r. 25.

(e) *Jubb v. Bibbs and Hill*, W. N., Dec. 1883, p. 208.

authority, to his solicitor, if the costs of the cause or matter are adjudged to him, but if he is ordered to pay the costs of the cause or matter, the amount is to be subject to a lien for the costs ordered to be paid to the opposite party. (a)

In adjusting the costs of the cause or matter, inquiry is, at the instance of any party, to be made into the propriety of exhibiting interrogatories, and if it is the opinion of the taxing officer or of the court or judge, either with or without an application for inquiry, that such interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs occasioned by the interrogatories and the answers thereto are to be paid in any event by the party in fault. (b)

## SECTION II.

### DISCOVERY OF DOCUMENTS.

Interrogatories as to documents were, according to the former practice, held to be improper; (c) and a different mode of procedure is still provided by the rules of court for such discovery.

Any party may, without filing any affidavit, apply to the court or a judge for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein; and the court or judge may either refuse or adjourn the application, if satisfied that the discovery is not necessary, or not necessary at that stage of the cause or matter, or may make such other order, either generally or limited to a class of documents, as may in their or his discretion be thought fit. (d)

The judge must in some way be satisfied that the docu-

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<p>(a) Ord. 31, r. 27; Fu. R. 1884, r. 44.</p> <p>(b) Ord. 31, r. 3.</p> <p>(c) <i>Pitton v. Chatterbury</i>, W. N.</p>	<p>1875, p. 248; <i>Bannacott v. Harris</i>, W. N. 1876, p. 9.</p> <p>(d) Ord. 31 r 12 and see r. 20.</p>
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ments are in the possession or power of the opposite party, and he may also require an affidavit in support of the application if there is nothing in the nature of the case to suggest that the documents are, or have been in the opposite party's possession or power. (a)

The application should not, as a rule, be made by a plaintiff before delivery of his statement of claim (b); nor by a defendant till after the delivery of the statement of defence. (c) Still there seems to be no doubt that the order may be made, on the application of either party, at any time. (d)

The party seeking discovery must, before making the application, pay into court to a "Security for costs account," the sum of 5*l.*, and any additional sum that may be ordered, to abide further order, as detailed *ante*, pp. 109, 110.

The party against whom the order is made must make and file an affidavit of documents, and specify which, if any, of such documents therein mentioned he objects to produce. (e) If it is asserted that the documents are privileged, the grounds upon which the privilege is claimed must be stated and verified. (f) Where a defendant in his affidavit objected to produce "certain documents, letters and correspondence which have passed between my legal advisers and myself," and "certain instructions and opinions of counsel" which are "numbered 50 to 76 inclusive, and tied up in a bundle marked with the letter A. and initialed;" it was held sufficient. (g)

If the affidavit is insufficient a further affidavit may be

(a) *Johnson v. Smith*, 36 L. T. Rep. N. S. 741; 25 W. R. 539.

(b) *Cashin v. Craddock*, 2 Ch. Div. 140; 34 L. T. Rep. N. S. 52.

(c) *British, &c., Company v. Wright*, 32 W. R. 413.

(d) *Union Bank of London v. Manby*, 13 Ch. Div. 239; 42 L. T.

Rep. N. S. 393; 49 L. J. 106, Ch.; 28 W. R. 23.

(e) Ord. 31, r. 13.

(f) *Gardner v. Irwin*, 4 Ex. Div. 49; 48 L. J. 223, Ex.; 40 L. T. Rep. N. S. 357; 27 W. R. 442.

(g) *Taylor v. Batten*, 4 Q. B. Div. 85; 27 W. R. 106; 48 L. J. 72, Q. B.; 39 L. T. Rep. N. S. 408.

ordered on summons to consider the sufficiency, but to obtain this it must be shown to be insufficient either from the affidavit itself, or from the documents therein referred to, or from admissions in the pleadings of the deponent.(a)

By order XXXI., rule 14, the court or a judge may, at any time during the pendency of a cause or matter, order the production by any party thereto, upon oath, of the documents in his possession or power relating to any matter in question therein, as may be thought right; and may deal with such documents when produced, as may appear just.

A discovery of documents may be resisted on similar grounds to those on which a discovery of facts may be resisted when sought by interrogatories, which are stated *ante*, pp. 107, 108.

And the same punishments attach for non-compliance with an order for discovery of documents as for non-compliance with an order to answer interrogatories, as detailed *ante*, p. 109.(b)

So a discovery of documents may be reserved until after the trial of any issue or question in dispute, as stated *ante*, p. 109.

### SECTION III.

#### PRODUCTION AND INSPECTION.

Where a party to a cause or matter refers in his pleadings or affidavits to any document, the other party may, at any time, give him written notice to produce such document for inspection, either by the party so giving the notice or his solicitor, and to permit him or his solicitor to take copies thereof. (c)

The party to whom such notice is given must, within two

(a) *Jones v. Monte Video Gas Company*, 5 Q. B. Div. 556; 49 L. J. 627, Q. B.; 42 L. T. Rep. N. S. 689; 28 W. B. 758.

(b) Ord. 31, rr. 21-23; *Joy v.*

*Hadley*, 22 Ch. Div. 571; 52 L. J. 471, Ch.; 47 L. T. Rep. N. S. 615; 31 W. B. 519.

(c) Ord. 31, r. 15.

days from its receipt, if all the documents have been set forth in the affidavit of documents, or within four days from its receipt if not all so set forth, deliver a counter notice, stating a time within three days from its delivery for inspection of such of the documents as he does not object to produce at his solicitor's office, or in case of bankers' books, or other books of account, or other books in constant use in trade or business at their usual place of custody, and stating which, if any, he objects to produce, and on what grounds. (a)

A party not complying with a notice to produce documents referred to in his pleadings or affidavits cannot afterwards use such documents in evidence on his behalf in the cause or matter, unless he can satisfy the court or a judge that, he being a defendant, they relate only to his own title, or state other sufficient grounds for non-compliance therewith. (b)

And if the party served with the notice to produce omits to give a counter notice of a time for inspection, or objects to give inspection, or offers inspection elsewhere than at his solicitor's office, the party giving the notice may apply to a judge for an order for inspection in such place and in such manner as he may think fit. (c)

A defendant is entitled, although he has not delivered his statement of defence, to inspection of any documents referred to in the pleadings or affidavit of any other party, unless sufficient cause for not ordering the inspection is shown, and the burden of showing sufficient cause is on the party from whom inspection is demanded. (d)

Refusal to a party's solicitor is refusal to the party. (e)

When a party applies for an order for inspection, then, unless the documents are either referred to in the pleadings or affidavits of the party against whom the order is applied

(a) Ord. 31, r. 17.

(b) Ord. 31, r. 15.

(c) Ord. 31, r. 18.

(d) *Quilter v. Tod Heatley*, 23 Ch. Div. 42; 48 L. T. Rep. N. S.

373, overruling *Webster v. Whewell*, 15 Ch. Div. 120; 28 W. R. 951; 42 L. T. Rep. N. S. 868.

(e) *Re Credit Company*, 11 Ch. Div. 256; 48 L. J. 221, Ch.; 27 W. R. 380.

for, or are disclosed in his affidavit of documents, the application must be founded upon an affidavit showing (1) what the documents are; (2) that the party applying is entitled to inspect them; and (3) that they are in the possession or power of the other party. (a)

As before stated, documents which relate exclusively to a party's own title, and communications between solicitor and client, &c., are privileged from inspection and production. (b) But it has been doubted whether a party can protect himself from producing a document on the ground that its production would tend to criminate him. (c)

Where no privilege is established, a judge has no discretionary power as to whether production of documents in the possession or power of the other party relating to the matters in question shall be ordered or not, the right thereto being exercisable at the option of the parties. (d)

But the right to inspection may, as before shown as to discovery (*ante*, pp. 109, 113), be reserved by the court or a judge until after the trial of any issue or question in dispute in the action, if it is desirable to do so. (e)

If books or documents relate to other matters besides those which are the subject of the action, such parts will be ordered to be sealed up before inspection is given; but an affidavit of the facts will be required. (f)

The order usually directs that the inspection shall take place at the office of the solicitor upon the record for the producing party. (g) But this rule may be varied if circumstances render it desirable that the production should be elsewhere. (h)

(a) Ord. 31, r. 18.

(b) See the authorities collected *ante*, p. 108.

(c) *Webb v. East* 5 Ex. Div. 108; 49 L. J. 250, Ex.; 41 L. T. Rep. N. S. 715; 28 W. R. 336.

(d) *Bustross v. White*, 1 Q. B. Div. 423; 34 L. T. Rep. N. S. 835; 45 L. J. 642, Q. B.; 24 W. R. 721; *English v. Tottie*, 1 Q. B.

Div. 141; 33 L. T. Rep. N. S. 724; 45 L. J. 138, Q. B.; 24 W. R. 393.

(e) Ord. 31, r. 20.

(f) *Ayk. Pr.* 352, 9th ed.

(g) *Brown v. Sewell*, 16 Ch. Div. 517; 44 L. T. Rep. N. S. 41; 29 W. R. 295.

(h) *Prestney v. Corporation of Colchester*, 24 Ch. Div. 376, C. A.



The same consequences follow for not complying with an order for inspection as for not complying with an order for discovery of documents, (a) stated *ante*, p. 109.

It has been decided that, notwithstanding sect. 100 in the Judicature Act, 1873, which enacts that "party" is to include every person served with notice of, or attending any proceedings, although not named on the record, the next friend of an infant plaintiff is not a party to the action, and that no order can be made against him for production of documents; (b) and for the same reason the guardian *ad litem* of a lunatic cannot be compelled to answer interrogatories. The ground of these decisions is that these persons cannot be called upon to make admissions against the interests of those parties in whose behalf they were appointed. (c)

Where title deeds are in the possession of the court, an order on the defendant for their inspection ought not to be made, as they are not in his possession or under his control. (d)

Where any deeds or other documents are ordered to be left or deposited, whether for safe custody or for the purpose of any inquiry in chambers, or otherwise, they are to be left or deposited at the Central Office of the High Court, and are to be subject to such directions as may be given for the production thereof. (e) The court or a judge may, however, order documents to be produced in the office of any district registrar. (f)

A schedule of the documents and a copy of the order must be left with the documents. (g)

(a) See Ord. 31, rr. 21-23.

(b) *Re Corsellis*; *Lawton v. Elwes*, 52 L. J. 399, Ch.; 48 L. T. Rep. N. S. 425; 31 W. R. 414.

(c) *Ingram v. Little*, 11 Q. B. Div. 251; 31 W. R. 858. But see *Higginson v. Hall*, 10 Ch. Div. 235;

48 L. J. 250, Ch.; 27 W. R. 469; 39 L. T. Rep. N. S. 603.

(d) *Vivian v. Little*, 11 Q. B. Div. 370; 48 L. T. Rep. N. S. 793; 31 W. R. 891.

(e) Ord. 61, r. 30.

(f) 36 & 37 Vict. c. 66, s. 66.

(g) 1 Alph. P. 288.

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CHAPTER XI.

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EVIDENCE.

Issue having been joined in the mode pointed out *ante*, p. 97, each party to the action must be prepared with the evidence necessary to prove such facts of his case as are not admitted by the opposite party.

It will be remembered that no pleading is to state the evidence by which the facts therein contained are to be proved. (a)

A party may support his case either by the evidence of witnesses or by documentary evidence, as well as by admissions in the pleadings or otherwise. The evidence of witnesses may be given either orally or by affidavit.

## SECTION I.

## VIVA VOCE EVIDENCE.

The evidence of witnesses must be taken *vivâ voce* in open court, either at the trial of any action or at any assessment of damages, unless the solicitors of all parties agree in writing to the contrary, or the court or judge for sufficient reason orders that any particular facts be proved by affidavit, or that the affidavit of any witness be read at the hearing or trial on such terms as may be imposed, or that the attendance of a witness in court should for sufficient reason be dispensed with, and he be examined by interrogatories or otherwise before a commissioner or one of the examiners of the court.

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(a) Ord. 19, r. 4.

But if it appears to the court or judge that the other party *bonâ fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order is not to be made authorising the evidence of such witness to be given by affidavit.(a)

And the court or judge may, in any cause or matter, when it appears necessary for the purposes of justice, order the examination of any witness or person upon oath at any place, and such examination must, in any cause or matter in the Chancery Division, be taken before one of the examiners of the court, unless the court or judge otherwise directs; in which case it may be directed to be taken before the court or a judge or an officer of the court, or any other person.(b)

As to who may be a witness in an action or other proceeding, the following enactments are now in force: By the 6 & 7 Vict. c. 85, s. 1, the testimony of a witness cannot be objected to by reason of his having been previously convicted of any crime or offence, or by reason of his having an interest in the matter in question, or in the event of the action or proceeding. And by the joint operation of the above Act and the 14 & 15 Vict. c. 99, and the 32 & 33 Vict. c. 68, the parties to an action are competent and compellable to give evidence in the action, either *vivâ voce* or by depositions, on behalf of any other of the parties to such action. But no person can be compelled to answer questions tending to criminate himself.

And by the 16 & 17 Vict. c. 83, the husbands and wives of the parties to a civil action are competent and compellable to give evidence for and on behalf of either or any of the parties to the action (sect. 1).(c) No husband or wife is, however, compellable to disclose any communication made to each other respectively during coverture (sect. 3). And in proceedings under the 45 & 46 Vict. c. 75, s. 12 (see *ante*,

(a) Ord. 37, rr. 1, 39.

(b) Ord. 37, rr. 5, 39.

(c) Extended to proceedings in consequence of adultery, by 32 & 33 Vict. c. 68.

p. 24), husband or wife are competent to give evidence against each other.

Persons refusing to be sworn from conscientious motives may, by the 17 & 18 Vict. c. 125, s. 20, be allowed by the court or a judge to give evidence upon solemn affirmation. And by the 32 & 33 Vict. c. 68, s. 4, if the presiding judge is satisfied that taking an oath would have no binding effect upon the conscience of a witness, he may allow such witness to give evidence on solemn declaration. (a)

The court or a judge may in any cause or matter, and at any stage of the proceedings, order the attendance of any person for the purpose of producing any writings or other documents to be named in the order. But the person cannot be compelled by the order to produce any document which he could not be compelled to produce at the hearing or trial. Disobedience of this order is a contempt of court, punishable accordingly. The witness is, however, entitled to conduct money and payment for expenses and loss of time, as upon attendance at a trial in court. (b)

Before the court will order a commission to issue to examine a witness abroad it must be shown that it is necessary for the purposes of justice, that the evidence of the witness is material, and that the application is *bonâ fide*. (c)

The court has jurisdiction to grant a commission for the examination of a party plaintiff to a cause as well as of a person who is a mere witness; but the depositions of such party ought not to be allowed to be read at the hearing if the defendant required him to appear at the trial to be examined and cross-examined, unless it be shown that it is practically impossible for him to attend. (d)

Where a witness in a summons under the Vendors and

(a) See further 33 & 34 Vict. c. 49; 38 & 39 Vict. c. 77, s. 20.

(b) Ord. 37, rr. 7-9.

(c) *Re Boyce; Crofton v. Crofton*, 20 Ch. Div. 760; 46 L. T. Rep. N. S. 822; 51 L. J. 660, Ch.; 30

W. R. 812; *Langden v. Tate*, 24 Ch. Div. 522, C. A.; 32 W. R. 189.

(d) *Nadin v. Bassett*, 25 Ch. Div. 21, C. A.; 49 L. T. Rep. N. S. 454; 32 W. R. 70.

Purchasers Act, 1874, refused to make an affidavit, he was ordered to be examined before an examiner. (a)

Where a material witness is, from ill-health, unlikely to be able to attend the trial, he may be ordered to be examined before an examiner. In this case there must be produced in support of the application, in addition to other necessary evidence, an affidavit of a medical man. (b)

Where an order is made to take the examination of a witness before an examiner of the court, the order, or a duplicate thereof, must be produced by the party prosecuting the order, or his solicitor, to one of the clerks of the registrars of the Chancery Division, who will thereupon mark it with the name of the examiner in rotation, before whom the examination will then be taken. The order or duplicate must afterwards be left with such examiner, and is a sufficient authority for him to proceed with the examination. (c)

The examiner must thereupon give an appointment, in writing, specifying the place and time, within not more than seven days, at which, subject to any application from the parties, the examination is to take place; and the party prosecuting the order, or his solicitor, must, within twenty-four hours, or such shorter time, if any, as may be mentioned in the order, give notice of the appointment to all parties. (d)

When any witness or person is ordered to be examined before an examiner of the court, or before any person appointed for the purpose, the person taking the examination must be furnished by the party on whose application the order was made with a copy of the writ and pleadings, if any, or with a copy of the documents necessary to inform the person taking the examination of the questions at issue between the parties. (e)

The examiner must, subject to any adjournment made by

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(a) *Re Springall and Goldsack's Contract*, W. N., 1875, p. 225.  
(b) 1 Alph. Pr. 307, 308.

(c) Ord. 37, rr. 41, 43.  
(d) Ord. 37, r. 44.  
(e) Ord. 37, rr. 10, 39.

the written consent of all parties, proceed, *de die in diem*, with the examination at the place and time appointed. (a)

A witness may be compelled to attend before an examiner by *subpoena ad testificandum*, and in case of refusal, or if having attended he refuses to be sworn, or to answer any lawful question, a certificate thereof, signed by the examiner, is to be filed at the Central Office, and the court or judge may, upon application made *ex parte*, or on notice, order the witness to attend, or to be sworn or to answer the question, as the case may be. (b)

When a witness is examined before an examiner it is done in the presence of the parties and their solicitors and counsel, and the witness is subject to cross-examination and re-examination, and the depositions are taken down in the form of a narrative, and not ordinarily, by question and answer, and when completed are read over to the witness and signed by him and countersigned by the examiner, and are then transmitted by the examiner to the Central Office, and there filed. The examiner may, however, put down any particular question or answer if there be any special reason for so doing. And if the witness objects to any question put to him, the question and the objection thereto are to be put down, with the opinion of the examiner thereon; but the examiner has no power to decide on the materiality or relevancy of any question, that being left for the decision of the court or a judge. (c)

The examiner may, with the written consent of all parties, take the examination of any witnesses in addition to those named in the order, and he must annex the consent to the original depositions. (d)

Upon the completion of the examination taken before an examiner of the court, he must indorse the original depositions with a note authenticated by his signature, certifying

(a) Ord. 37, r. 45.  
(b) Ord. 37, rr. 13, 20.

(c) Ord. 37, rr. 11, 12, 14, 16.  
(d) Ord. 37, r. 46.

the number of hours or days, as the case may be, exclusively employed thereupon, and the fees received in respect thereof; and he must forthwith notify such completion to one of the clerks to the registrars in Chancery. (a)

The court or a judge may empower any party to the cause or matter to give the depositions in evidence therein on such terms, if any, as may be directed. (b)

The depositions must, before they are used at the trial or hearing of the action, be printed by the party on whose behalf they were taken and filed, unless otherwise ordered; for which purpose the officer with whom they are filed delivers out on demand a copy of the depositions. But if the depositions have been previously used upon any proceeding without being printed, the rule as to printing does not apply. (c)

Any examiner of the court or other person directed to take the examination of any witness or person may administer oaths. (d)

When a single commissioner is appointed to take evidence abroad the commission should authorise him to administer the oath to himself. (e)

Except where otherwise provided, or directed by the court or a judge, no deposition can be given in evidence at the hearing or trial of the cause or matter without the consent of the party against whom the same may be offered, unless the court or judge is satisfied that the deponent is dead, or beyond the jurisdiction of the court, or unable from sickness or other infirmity to attend the hearing or trial, in any of which cases the depositions certified under the hand of the person taking the examination are admissible in evidence, saving all just exceptions, without proof of the signature to such certificate. (f)

(a) Ord. 37, r. 47.

(b) Ord. 37, r. 5.

(c) See Ord. 66, rr. 5, 6.

(d) Ord. 37, rr. 19, 39.

(e) *Wilson v. De Coulon*, 22 Ch. Div. 841; 48 L. T. Rep. N. S. 519; 31 W. R. 339.

(f) Ord. 37, r. 18.

When a witness is required to attend at the trial of a cause for the purpose of giving evidence, and he refuses to attend voluntarily, he must be compelled to attend by being personally served with a copy of a *subpœna ad testificandum*, the original being at the time shown to him. His necessary expenses should also be paid to him. The service is of no validity if not made within twelve weeks from the teste of the writ. The service is proved by affidavit. (a)

Every *subpœna* other than a *subpœna duces tecum* shall contain the names of three witnesses when necessary or required, but may contain any larger number of names. (b)

Before the writ is issued a *præcipe*, containing the name and address of the solicitor, and agent, if one, issuing out the same, must be left at the central office. (c)

If a witness neglects to attend to give evidence after being served with a *subpœna ad test.*, in the way above shown, he is liable to an attachment for contempt of court, and also to an action for damages. (d)

If a witness is in prison he must be brought up to give evidence under a writ of *habeas corpus ad testificandum*, an order being first obtained for that purpose. (e)

When a witness gives evidence in court he is first sworn, or is allowed to affirm or make solemn declaration, as pointed out *ante*, p. 119. He is then examined in chief, cross-examined by the opposite party, and re-examined by the party calling him.

The judge may in all cases disallow any questions put in cross-examination of any party or other witness which appears to be vexatious, and not relevant to any matter proper to be inquired into in the cause or matter. (f)

An order to read evidence taken in another cause or matter is not necessary, but such evidence may, saving all just

(a) See Ord. 37, rr. 32-34; Ayck. Pr. 189, 9th ed.

(b) Ord. 37, r. 29.

(c) Ord. 37, r. 26.

(d) 1 Alph. Pr. 319.

(e) 1 Alph. Pr. 319.

(f) Ord. 36, r. 38.



exceptions, be read on *ex parte* applications by leave of the court or a judge, to be obtained at the time of making any such application, and in any other case upon the party desiring to use such evidence giving two days previous notice to the other parties of his intention to read such evidence. (a)

Evidence taken subsequently to the hearing or trial of a cause or matter is to be taken, as nearly as may be, in the same manner as evidence taken at or with a view to a trial. (b)

So the practice with reference to the examination, cross-examination, and re-examination of witnesses at a trial is to extend and be applicable to evidence taken in any cause or matter at any stage. (c)

No affidavit or deposition filed or made before issue joined in any cause or matter is, without special leave of the court or a judge, to be received at the hearing or trial, unless within one month after issue joined, or within such longer time as may be allowed by the court or a judge, written notice has been given by the party intending to use the same to the opposite party of his intention to do so. (d)

All evidence taken at the hearing or trial of any cause or matter may be used in any subsequent proceedings in the same cause or matter. (e)

Any party may by written notice, at any time not later than nine days before the day for which notice of trial has been given, call on any other party to admit for the purposes of the cause, matter, or issue only, any specific facts mentioned in the notice. And in case of refusal or neglect to admit the same within six days after service of the notice, or within such further time as may be allowed by the court or a judge, the costs of proving such facts are to be paid by the party so neglecting or refusing, whatever may be the result

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(a) Ord. 37, r. 3.  
(b) Ord. 37, r. 21.  
(c) Ord. 37, r. 22.

(d) Ord. 37, r. 24.  
(e) Ord. 37, r. 25.

of the cause, matter, or issue, unless at the trial or hearing the court or judge certify that the refusal to admit was reasonable, or at any other time otherwise order. The admission is to be deemed to be made only for the purpose of the particular cause, matter, or issue, and not one to be used against the party on any other occasion, and only in favour of the party giving the notice. And the court or a judge may allow the party to amend or withdraw his admission on such terms as may be just. (a)

The signature to the admission is proved by the affidavit of the solicitor or his clerk, if evidence thereof is required. (b)

## SECTION II.

### EXAMINATION *DE BENE ESSE*.

If from the particular circumstances of the case it is deemed essential to obtain the evidence of witnesses at a period prior to the regular time for their examination in the cause, that is before issue joined, such witnesses may be examined *de bene esse* as it is called. But this is merely a conditional examination, to be used only in case the persons so examined cannot afterwards, by reason of their being dead, or being beyond the seas, or at a great distance, be examined in chief in the cause at the regular time. (c)

When a witness is seventy years of age or upwards, or is in a dangerous state of health, or is about to go abroad, whereby his evidence is liable to be lost, an order may be obtained to examine *de bene esse*. So, where a matter of great importance is in the knowledge of one witness only, though not old or infirm, the order will be granted. (d)

If the order is applied for on the ground of there being only one witness to a particular fact, it must be upon notice

(a) Ord. 32, r. 4.

(b) Ord. 32, r. 7.

(c) Ayck. Pr. 184, 9th ed.; Dan. 653, 6th ed.

(d) Ayck. Pr. 185, 9th ed.; Dan. Pr. 654, 6th ed.

of motion or summons. But in the other cases the order may, it seems, be obtained without waiting for the defendant's appearance. The application must, in any case, be supported by an affidavit of the facts, such as the age of the witness, and that his evidence is material, &c.; and if made on the ground that the person proposed to be examined is the only witness to a particular fact, the affidavit should state the fact to which he is to be examined. (a)

The examination, if ordered, will be taken before an examiner of the court in the mode stated *ante*, p. 120, 122 (b), and the deposition can only be used on the terms stated *ante*, p. 124.

### SECTION III.

#### AFFIDAVIT EVIDENCE.

We now come to the other mode by which witnesses may give evidence, namely, by affidavits.

An affidavit may be described as a written statement upon oath, and consists of four parts: the title, the name and description of the deponent or witness, the body, or facts sworn to, and the jurat.

Affidavit evidence can only be used at the trial or hearing of an action (1) by written agreement between the solicitors of all parties; or (2) by order of the court or a judge, as detailed *ante*, p. 117, but the order will not be made if it appears that the other party *bonâ fide* desires the production of the witness for cross-examination, and that he can be produced (c); and (3) where an affidavit has been made in answer to interrogatories, any party may at the trial use in evidence any one or more of such answers, or any part of an answer, unless the judge, on account of the answers being connected, orders all those answers to be put in which are so connected as fully stated *ante*, p. 109. (d)

(a) Dan. Pr. 655, 6th ed.; Ayok. Pr. 185, 9th ed.

(b) See Ord. 37, r. 39.

(c) Ord. 37, r. 1.

(d) Ord. 31, r. 24.

The court has, however, jurisdiction to refuse to allow affidavits which have been filed under a consent to take evidence by affidavit, to be read, and may order the witnesses to attend at the trial for the purpose of being examined *vivâ voce*. (a)

Upon the hearing of any petition, motion, or summons, the evidence may be given by affidavit, but the court or a judge may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit. (b)

Where an agreement is entered into to take the evidence by affidavit at the hearing, a formal consent in writing must be given, and not one to be gathered from correspondence between the parties. (c)

The guardian *ad litem* of a person under disability might, under the former practice, consent that the evidence should be taken by affidavit without an order from the court. (d) His solicitor may now, thereseore, consent.

As to the terms upon which an affidavit made before issue joined can be received at the hearing or trial, see *ante*, p. 124.

Where a party to an action, after entering into an agreement to take the evidence by affidavit, discovers, to his surprise, that his witnesses will not make affidavits, the court will, on proof thereof, relieve him from the agreement, and permit the evidence to be taken *vivâ voce*. (e)

Every affidavit must be entitled in the cause or matter in which it is sworn, and must be drawn up in the first person of the deponent, giving his description and true place of abode, and be divided into paragraphs numbered consecutively, and as nearly as may be confined to a distinct portion of the subject, and written or printed bookwise. No costs will be allowed for any affidavit substantially departing from this rule. (f)

(a) *Lovell v. Wallis*, W. N., 1883, p. 231; 49 L. T. Rep. N. S. 593.

(b) Ord. 38, r. 1.

(c) *New Westminster Brewery Company v. Hannah*, 1 Ch. Div. 278; 24 W. R. 137.

(d) *Fryer v. Wiseman*, 45 L. J.

199, Ch.; 33 L. T. Rep. N. S. 779; 24 W. R. 205.

(e) *Warner v. Mosses*, 16 Ch. Div. 100; 29 W. R. 201; 50 L. J. 28, Ch.; 43 L. T. Rep. N. S. 401.

(f) Ord. 38, rr. 2, 7, 8.

Affidavits must be confined to such facts as the witness is able, of his own knowledge, to prove, except affidavits used on interlocutory motions, when statements of belief with the grounds thereof may be admitted. And the costs of any affidavits which unnecessarily set forth matters of hearsay or argument, or copies of, or extracts from, documents, are to be paid by the party filing them. (a)

The affidavit concludes with the jurat, which states the date when, and the place where, it is sworn. And if it is made by two or more deponents their names must be inserted in the jurat, unless all the deponents are sworn at one time by the same officer, for then it is sufficient to state that the affidavit was sworn by both, or all, the "above-named" deponents. (b)

The person making the affidavit signs it at the side of the jurat, and is then sworn, the person taking the affidavit signs under the jurat.

Oath includes solemn affirmation and statutory declaration. (c)

Interlineations or alterations, not being erasures, whether in the body or jurat of an affidavit, must be authenticated by the initials of the officer taking the affidavit, or, if taken at the Central Office, by the initials of such officer, or by the stamp of the office, and erasures must be rewritten and signed or initialled in the margin by the officer taking it, otherwise the affidavit cannot be read or made use of without leave of the court or a judge. But an affidavit defective by reason of misdescription of parties or otherwise in the title or jurat, or any other irregularity in the form thereof, may be received by the court or a judge, who may direct a memorandum to be made thereon that it has been so received. (d)

Any document referred to in an affidavit must not be

(a) Ord. 38, r. 3.

(b) Ord. 38, rr. 5, 9.

(c) 36 & 37 Vict. c. 66, s. 100.

(d) Ord. 38, rr. 12, 14.

annexed to the affidavit, but merely referred to as an exhibit, and the certificate on the exhibit must be marked with the short title of the cause or matter, and signed by the commissioner or officer before whom the affidavit is sworn. (a) The exhibit must also be distinguished by some mark.

Affidavits sworn in England are to be sworn before a judge, district registrar, commissioner to administer oaths, or officer empowered under rules of court to administer oaths. Solicitors are usually made commissioners to administer oaths; but an affidavit must not be sworn before the solicitor acting for the party on whose behalf the affidavit is to be used, or before the partner, clerk or agent of such solicitor, or before the party himself. (b)

Every master, and every first and second class clerk in the filing and record department of the Central Office is to have, by virtue of his office, authority to take oaths and affidavits in the Supreme Court. (c)

And each chief clerk is, for the purpose of any proceedings before him, to have power to administer oaths. (d)

Affidavits may be sworn or taken in Scotland or Ireland or the Channel Islands, or in any colony or place under the Queen's dominions abroad; before any judge, court, notary public, or person lawfully authorised to administer oaths there, or before any of Her Majesty's consuls or vice-consuls in foreign parts out of Her Majesty's dominions. (e)

British ambassadors and other diplomatic and consular agents abroad may administer oaths. (f)

If the person making the affidavit appears to be illiterate or blind the officer taking it must certify in the jurat that the affidavit was read in his presence to the deponent who seemed perfectly to understand it, and signed it in the officer's pre-

(a) Ord. 38, rr. 23, 24.

(b) Ord. 38, rr. 4, 16, 17.

(c) Ord. 61, r. 5.

(d) Ord. 55, r. 16.

(e) 15 & 16 Vict. c. 86, s. 22;

16 & 17 Vict. c. 78, s. 6; Ord. 38, r. 6; *Cook v. Wilby*, 32 W.R. 379.

(f) 6 Geo. 4, c. 87, s. 20; 18 & 19 Vict. c. 42.

sence. In the absence of this certificate the affidavit cannot be used in evidence, unless the court or a judge is otherwise satisfied that the affidavit was read over to and appeared to be perfectly understood by the deponent. (a)

The court or a judge may order to be struck out from any affidavit any matter which is scandalous, and order the costs of the application to be paid as between solicitor and client. (b)

Affidavits may be sworn to either in print or in manuscript, or partly in print and partly in manuscript. At the foot of every affidavit there must be a note showing on whose behalf it is filed, or it cannot be used, unless otherwise directed. Every affidavit used in a cause or matter proceeding in a district registry must be filed there; and every other affidavit used must be filed in the Central Office. (c)

When the parties agree to take the evidence by affidavits, the plaintiff must, within fourteen days after the consent has been given, or within such time as may be agreed upon or be allowed by the court or a judge, file his affidavits and deliver to the defendant or his solicitor a list thereof. (d)

The defendant has a like time after delivery of this list to file his affidavits and deliver a list thereof to the plaintiff or his solicitor. (e)

The plaintiff must, within seven days after the expiration of the last mentioned fourteen days, or such other time as aforesaid, file his affidavits in reply, which must be confined to matters strictly in reply, and deliver a list thereof to the defendant or his solicitor. ( )

If the plaintiff's affidavits are not confined strictly to matters in reply the court may, at the hearing, disregard them, or give the defendant leave to answer them, but will not order them to be taken off the file (g)

(a) Ord. 38, r. 13.

(b) Ord. 38, r. 11.

(c) Ord. 66, rr. 4, 7 (k); Ord. 38, r. 10.

(d) Ord. 38, r. 25.

(e) Ord. 38, r. 26.

(f) Ord. 38, r. 27.

(g) *Gilbert v. Comedy Opera Company*, 16 Ch. Div. 594; 43 L. T. Rep. N. S. 665; 29 W. R. 169.

When the parties agree that the evidence shall be taken by affidavit at the hearing such evidence must be printed by the party on whose behalf the affidavits are respectively filed. (a) But if an affidavit has been previously used upon any proceeding without being printed the above rule as to printing does not apply. (b)

To enable a party to print any affidavit or deposition the officer with whom it is filed must, on demand, deliver to such party a copy written on draft paper on one side only. (c)

The party printing an affidavit must, on written demand, furnish to any other party any number of printed copies not exceeding ten, upon payment for them at the rate of 1*d.* per folio for one copy, and  $\frac{1}{2}$ *d.* per folio for every other copy. (d)

Copies of affidavits not required to be printed are furnished by the party filing them, on a written request and undertaking to pay for them by the party requiring them, or his solicitor, and are to be ready for delivery at the expiration of twenty-four hours after receipt of the request and undertaking, or within such time as the court or a judge directs. (e)

Office copies of affidavits filed are those generally used in court, and if an original affidavit is allowed to be used, it must first be stamped with a proper filing stamp, and be afterwards filed. (f)

When the evidence is taken by affidavit, and a party desires to cross-examine a deponent on an affidavit filed on behalf of the opposite party, he must, within fourteen days from the expiration of the time allowed for filing affidavits in reply, or within such time as the court or judge may appoint, serve upon the party filing the affidavit a written notice requiring the production of the deponent for cross-examination at the trial. And the party so required to produce the deponent may compel his attendance in the same way

(a) Ord. 38, r. 30; Ord. 66, r. 7.

(b) Ord. 66, r. 6.

(c) Ord. 66, r. 7 (b).

(d) Ord. 66, r. 7 (c).

(e) Ord. 66, r. 7 (h, i).

(f) Ord. 38, r. 15.



as he may compel the attendance of a witness to be examined. (a)

Unless the deponent is produced his affidavit cannot be used as evidence, except by special leave of the court or a judge. (b) But no order will be made to take the affidavit off the file. (c)

The party producing such deponent for cross-examination is not entitled to demand the expenses thereof in the first instance from the party requiring his production. (d)

Where, upon any motion, petition, or summons, evidence is given by affidavit, the court or a judge may, upon the application of either party, order the attendance for cross-examination of the person making any such affidavit. (e)

Where a witness has made and filed an affidavit for the purpose of being used in a matter pending before the court, he cannot be exempted from cross-examination by the withdrawal of the affidavit. (f)

## SECTION IV.

### DOCUMENTARY EVIDENCE.

As to discovery of documents, and the production, inspection, and deposit thereof, see *ante*, p. 111, *et seq.*

Either party may call upon the other party to admit any document, saving all just exceptions, and in case of refusal or neglect to admit after such notice, the costs of proving such document must be paid by the party so refusing or neglecting, whatever may be the result of the cause or matter, unless the court or a judge at the trial or hearing certifies that such refusal to admit was reasonable. If this notice is not given no costs of proving the document will be

(a) Ord. 38, rr. 28, 29.

(b) Ord. 38, r. 28.

(c) *Meyrick v. James*, 46 L. J. 579, Ch.

(d) Ord. 38, r. 28.

(e) Ord. 38, r. 1.

(f) *Re Quarts Hill, &c., Company*; *Es parte Young*, 21 Ch. Div. 642; 51 L. J. 940, Ch.; 47 L. T. Rep. N. S. 644; 31 W. R. 173.

allowed, unless the omission to give the notice is in the opinion of the taxing officer a saving of expense. (a)

Notice to produce at the trial documents in the possession of the opposite party must be served in order to give secondary evidence of their contents if not produced.

The service of a notice to produce, and the time of such service, is proved by an affidavit of the solicitor or his clerk, with a copy of the notice. (b)

The signature to admissions is proved by the affidavit of the solicitor or his clerk, if evidence thereof is required. (c)

Deeds, bonds, and all other writings thirty years old and upwards, coming out of the possession of the party entitled thereto, prove themselves. If a deed requires proof, the witness must not only prove his attestation thereto, but also the execution of the deed by the person executing it. (d)

As to private, local, and personal Acts of Parliament, see 8 & 9 Vict. c. 113, s. 3; as to public documents, see 14 & 15 Vict. c. 99, s. 14; and as to probate of a will, see 20 & 21 Vict. c. 77, s. 64.

By the 17 & 18 Vict. c. 125, s. 26, it is not necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite, as it may be proved by admission or otherwise.

Where written documents have been neglected to be proved before the closing of evidence, they may generally be proved at the hearing either *videlicet* or by affidavit. An order, which is an order of course, is first necessary; and it must be served on the opposite party. (e)

Deeds or other instruments which require proof of their execution by a subscribing witness, as deeds executed under powers, or promissory notes, letters, &c., of which proof must be given of the handwriting of the persons subscribing the

(a) Ord. 32, r. 2.

(b) Ord. 32, r. 8.

(c) Ord. 32, r. 7.

(d) Ayek. Pr. 159, 9th ed.; Pow. Ev. 307.

(e) It is presumed this practice will now only obtain when the evidence is taken by affidavits. (Dan. Pr. 607, and note (rr) 6th ed.)

same, are all considered as exhibits, and may be proved *vidē voce* or by affidavit. (a)

No exhibit, however, could be proved by *vidē voce* examination that required more than proof of execution, or of handwriting, to substantiate it; nor where such examination would admit of cross-examination. Where, however, the execution of a deed was not controverted, but its validity only disputed, it might be proved *vidē voce* at the hearing. A deed in which fraud is imputed cannot be so proved. (b)

In a modern case, however, a will which was disputed by the heir was allowed to be proved at the hearing, and the cross-examination to take place there. (c)

A decree may be given in evidence between the parties to it, and any persons claiming under them. (d) The contents of the decree may be proved by the production of the decree itself, or of a duly certified office copy. (e)

## SECTION V.

### PERPETUATING TESTIMONY.

When the testimony of witnesses is in danger of being lost before the matter to which such evidence relates can be made the subject of judicial investigation, the court will lend its aid to preserve and perpetuate such testimony.

Thus, if an estate be devised by will away from the heir-at-law, and the devisee is desirous to secure the testimony of the witnesses to the will, he may bring his action for the sole purpose of having the evidence of the witnesses to the will taken and perpetuated. As soon as the evidence is taken the action is at an end, for, as no relief is claimed in actions of this nature, they are not allowed to be set down for trial. (f)

(a) Ayck. Pr. 161, 9th ed.

(b) Ayck. Pr. 161, 162, 9th ed.

(c) *Chichester v. Chichester*, 24 Beav. 289.

(d) See notes to *Duchess of Kingston's case*, 2 Sm. L. C. 826, 8th ed.

(e) Drew. Pr. 109, 110; Pow. Ev. 250.

(f) Ayck. Pr. 270, 9th ed.; Sm. Man. Eq. 473, 8th ed.; Ord. 37, r. 38.

And any person who would, under the circumstances alleged by him to exist, become entitled, upon the happening of any future event, to any honour, title, dignity, or office, or to any estate or interest in property, real or personal, the right or claim to which cannot by him be brought to trial before the happening of such event, may bring an action to perpetuate any testimony which may be material for establishing such right or claim. (a)

By the 20 & 21 Vict. c. 77, where a will has been proved in solemn form in, or its validity decided by, the Probate Division of the High Court, this binds persons interested in the real estate comprised in the will (see sects. 61, 62). And where this has been done, it will, of course, be unnecessary to go into Chancery to establish the will.

Witnesses cannot be examined to perpetuate testimony until an action has been commenced for the purpose. (b) The evidence is taken before an examiner of the court, or a special examiner, or by affidavit, the deponents being liable to cross-examination. As above stated, when the witnesses have been examined the cause is at an end, and the evidence must be filed in the proper department of the Central Office. If it should afterwards become necessary to use the depositions in an action relating to the property, an order must be obtained on notice of motion supported by evidence of the death or other inability of the witnesses to attend to be examined. (c)

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(a) Ord. 37, rr. 35, 36.

(b) Ord. 37, r. 37.

(c) 1 Alph. Pr. 335; Ord. 37, r. 18.

## CHAPTER XII.

## SECTION I.

## NOTICE AND ENTRY OF TRIAL.

THE evidence being ready, or taken, the next step is to give notice of trial and enter the cause or matter for trial.

Notice of trial may be given in any cause or matter by the plaintiff or other party in the position of plaintiff. Such notice may be given with the reply (if any), whether it closes the pleadings or not, or at any time after the issues of fact are ready for trial. (a) And when the evidence is taken by affidavit the notice of trial is to be given at the same time after the close of the evidence, as in other cases, after the close of the pleadings (see *infra*). But other affidavits may be printed if all the parties interested consent thereto, or the court or a judge so order. (b)

If the plaintiff does not within six weeks after the close of the pleadings, or evidence, if taken on affidavit, or within such extended time as the court or judge may allow, give notice of trial, the defendant may either give notice of trial or move to dismiss the action for want of prosecution. (c)

The notice of trial must state whether it is for the trial of the cause or matter or of issues therein. (d)

Ten days' notice of trial must be given, and is sufficient, unless the party to whom it is given has consented, or is under terms, or has been ordered to take short notice of

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(a) Ord. 36, r. 11.

(b) Ord. 38, r. 30.

(c) Ord. 36, r. 12; Ord. 38, r. 30.

(d) Ord. 36, r. 18.

trial. Short notice of trial is to be four days' notice, unless otherwise ordered. (a)

Notice of trial must be given before entering the trial. But the notice may be given, and the trial entered, although the pleadings are not closed. (b)

If notice of trial be given for London or Middlesex, it does not operate as for any particular sittings, but is deemed to be for any day after the expiration of the notice on which the trial may come on in its order upon the list. (c) And if the notice is for trial elsewhere than in London or Middlesex it is deemed to be for the first day of the then next assizes at the place for which notice of trial is given. (d)

No notice of trial can be countermanded except by consent, or by leave of the court or a judge, to be given subject to such terms as to costs or otherwise as may be just. (e)

If the party giving notice of trial for London or Middlesex omits to enter the trial on the day or day after giving the notice, the party to whom it is given may, unless the notice is countermanded, enter the trial within four days. (f) And in London and Middlesex, unless within six days after notice of trial is given the trial is entered by one party or the other, the notice of trial is no longer in force. (g)

If notice be given of any action or issue for trial elsewhere than in London or Middlesex, either party may, at any time before the day next before the commission day, enter the trial at the next assizes in the district registry (if any) of the city or town where the trial is to be had, or with the associate at the assize town as heretofore. (h)

In the Chancery Division the trial is entered in London with the registrar at the Central Office.

The party entering the trial must deliver to the proper officer two copies of the whole of the pleadings, one of

(a) Ord. 36, r. 14.

(b) Ord. 36, rr. 11, 15.

(c) Ord. 36, r. 17.

(d) Ord. 36, r. 18.

(e) Ord. 36, r. 19.

(f) Ord. 36, r. 20.

(g) Ord. 36, r. 16.

(h) Ord. 36, r. 22; and see r. 23.

which is for the use of the judge at the trial. Such copies are to be in print, except as to such parts, if any, of the documents as are by the rules of court permitted to be written. (a)

If the trial be entered by both parties, it is to be tried in the order of the plaintiff's entry, and the defendant's entry is to be vacated. (b)

When a cause has been entered for trial it may be withdrawn by either plaintiff or defendant, upon producing to the proper officer a consent in writing signed by the parties. (c)

## SECTION II.

### SHORT CAUSES.

Short causes are those in which the decree is either as of course or involves very little difficulty. The court will not allow a cause to be heard as a short cause unless it is such as may be heard upon affidavit evidence, and upon a short statement to the court, or is one that requires the directions of the court upon some short point. As a general rule, a cause should not be entered as a short cause if it will take more than ten minutes. (d)

These causes are marked "short" on production of a certificate from the plaintiff's counsel that the cause is fit to be heard as a short cause, without the consent of the solicitor for the defendant. (e)

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(a) Ord. 36, r. 30.

(b) Ord. 36, r. 28.

(c) Ord. 26, r. 2.

(d) 1 Alph. Pr. 305; Ayck. Pr. 201, 9th ed.

(e) Ayck. Pr. 201, 9th ed.

## CHAPTER XIII.

## THE TRIAL.

CAUSES or matters assigned to the Chancery Division by the Judicature Act, 1873 (see *ante*, p. 11), are to be tried by a judge without a jury, unless the court or a judge otherwise order. (a)

However, except causes or matters thus assigned, or causes or matters which previously to the passing of the Judicature Act, 1873, could, without any consent of parties have been tried without a jury, or causes or matters requiring prolonged examination of documents or accounts, or any scientific or local investigation, which cannot conveniently be made with a jury, the court or a judge, on the application of any party for a trial with a jury of the cause or matter or any issue of fact, must make an order for a trial with a jury. (b)

And in these excepted causes (c) or matters the court or judge *may* order any such cause, matter, or issue therein to be tried by a judge with a jury, or by a judge sitting with assessors, or by an official referee or special referee with or without assessors. (d)

But if an order is made for the trial of a cause commenced in the Chancery Division, by a judge and jury, it cannot be so tried by a judge of that division. It must be tried at the sittings for trials by jury in London or Middlesex, or at

(a) Ord. 36, r. 3.

(b) See Ord. 36, rr. 3-6.

(c) As to where, in actions for libel, slander, false imprisonment, malicious prosecution, seduction,

or breach of promise, a jury may be claimed by notice, see r. 2, Ord. 36, *et post*, Ch. 25.

(d) Ord. 36, rr. 3, 7.



the assizes, by one of the judges on circuit with a jury. (a)

And subject to the provisions of the preceding rules, the court or a judge may, in any cause or matter at any time, order that different questions of fact arising therein be tried by different modes of trial, or that one or more questions of fact be tried before the others, and may appoint the places for such trials, and in all cases may order that one or more issues of fact be tried before any other or others. (b)

But an application to have one issue in action tried before another will only be granted on very special grounds. Where a defendant in a partnership action set up by counter-claim an agreement by the plaintiff for sale to the defendant of the plaintiff's interest in the partnership at a stated price, it was held that the defendant was not entitled to have the issue raised by his counter-claim tried before the plaintiff's issues in the action. (c)

Notice of trial having been given and the trial entered in the mode pointed out in preceding pages, it will come on for hearing, in its order (which may be ascertained from the registrar's list), before the judge to whose court the cause or matter is attached, unless removed by special order of the Lord Chancellor (d); or sent for trial by a judge with a jury.

The trial will take place in Middlesex, unless some other place of trial is named in the statement of claim, or unless a judge otherwise order, as fully shown *ante*, p. 68. (e)

If when a trial is called on the plaintiff appears and the defendant does not appear, the plaintiff may prove his claim, so far as the burden of proof lies upon him. (f) And proof of the service of the notice of trial need not it seems be given. (g)

(a) *Clarke v. Cookson*, 2 Ch. Div. 746; 45 L. J. 753, Ch.; 34 L. T. Rep. N. S. 646; 24 W. R. 535; *Warner v. Murdock*, 4 Ch. Div. 750; 46 L. J. 121, Ch.; 35 L. T. Rep. N. S. 748; 25 W. R. 207.

(b) Ord. 36, r. 8.

(c) *Piercy v. Young*, 15 Ch. Div. 475; 42 L. T. Rep. N. S. 262.

(d) 36 & 37 Vict. c. 66, ss. 33, 36; Ord. 5, r. 9; Ord. 49, rr. 1, 2.

(e) Ord. 20, r. 5; Ord. 36, r. 1.

(f) Ord. 36, r. 31.

(g) *Chorlton v. Dickie*, 13 Ch. Div. 160; 49 L. J. 40, Ch.; 28 W. R. 228; 41 L. T. Rep. N. S. 467.

If when the action is called on for trial the defendant appears, and the plaintiff does not, the defendant, if he has no counter-claim, is entitled to judgment dismissing the action, but if he has a counter-claim, he may prove it, so far as the burden of proof lies upon him (a); without proving that he has been served with notice of trial. (b)

But any verdict or judgment obtained where one party does not appear at the trial may be set aside by the court or a judge, upon such terms as may seem fit, if the application is made within six days after the trial, either at the assizes or in Middlesex. (c) If, for instance, judgment has been obtained through the default of the solicitor being unprepared to proceed at the trial, the judgment will, as a matter of course, be set aside, and the case restored to the list on payment of the costs of the day and the costs of the application. (d)

The general rules as to the addresses of counsel are these:

On a question of fact only one counsel will be heard on each side.

Where there is a question of law (and the amount in dispute exceeds 50*l.*) (e) two counsel will be heard on each side.

Where the evidence is not *vivâ voce* the plaintiff's leading counsel opens and argues his case, the plaintiff's evidence is read, and the plaintiff's junior counsel is heard. Then the defendant's leading counsel opens and argues his case, the defendant's evidence is read, and the defendant's junior counsel is heard. The plaintiff's leading counsel afterwards replies.

Where the evidence is *vivâ voce* the plaintiff's counsel are heard, the plaintiff's witnesses are examined, cross-examined, and re-examined. Then the defendant's counsel are heard,

(a) Ord. 36, r. 32.

(b) *James v. Crow*, L. Rep. 7 Ch. Div. 410; 47 L. J. 200, Ch.; 26 W. R. 236; 37 L. T. Rep. N. S. 749; *Skipper v. Skipper*, 32 W. R. 83.

(c) Ord. 36, r. 33.

(d) *Burgoin v. Taylor*, 9 Ch. Div. 1, C. A.; 47 L. J. 542, Ch.; 38 L. T. Rep. N. S. 438; 26 W. R. 568.

(e) See Ord. 65, rr. 46, 47.

the defendant's witnesses examined, cross-examined, and re-examined. (a) And as to the addresses of counsel upon a trial with a jury, see Order XXXVI., rule 36.

The judge has power, if he thinks it expedient for the interests of justice, to postpone or adjourn the trial, for such time and to such place, and upon such terms, if any, as he may think fit. (b)

Where a cause was adjourned to amend by adding a party, the party applying for the adjournment was ordered to pay all the costs occasioned by the cause having been put in the cause paper, and not merely the costs of the day. (c)

The judge may, at or after the trial, direct that judgment be entered for any or either party, or adjourn the case for further consideration, or leave any party to move for judgment. (d)

The judge may, if he thinks fit, try the cause or matter wholly or partially with the assistance of assessors specially qualified, or refer any question arising therein to an official or special referee. (e)

#### INQUIRY AND TRIAL BEFORE A REFEREE.

Any question arising in any cause or matter may be referred by the court or a judge before whom such cause or matter is pending for inquiry and report to an official or special referee. (f)

It has been decided that the whole action cannot be referred under this section to an official or special referee, but only a question arising therein. (g) See now, however, Order XXXVI., rules 49, 50, stated *post*, p. 144.

Where all the parties interested in a cause or matter are

(a) See 1 Alph. Pr. 886, 887; and as to the costs allowed for counsel, see Ord. 65, rr. 44, *et seq.*

(b) Ord. 36, r. 34.

(c) *Lydall v. Martinson*, 5 Ch. Div. 780; 37 L. T. Rep. N. S. 69; 25 W. R. 866.

(d) Ord. 36, r. 39.

(e) 36 & 37 Vict. c. 66, s. 56; Ord. 36, rr. 7, 43.

(f) 36 & 37 Vict. c. 66, s. 56.

(g) *Longman v. East*, 3 C. P. Div. 142; 47 L. J. 211, C. P.; 38 L. T. Rep. N. S. 826; 26 W. R. 183.

*sui juris* and consent, or without such consent in any cause or matter requiring a prolonged examination of documents or accounts, or a scientific or local investigation which cannot conveniently be made before a jury or the court's ordinary officers, an order may at any time be made by the court or a judge that any question or issue of fact, or account therein, be tried before an official referee, or a special referee, to be agreed upon by the parties. (a)

Even under this section it has been held that the whole action cannot be ordered to be tried before a referee without consent (b), especially where questions of fraud seriously affecting a party's character are involved (c), unless the issues also involve a prolonged examination of documents. (d) And the Court of Appeal decided that in any case in which the court has jurisdiction to refer compulsorily a question of account to an official referee, it has also jurisdiction so to refer all the other issues in the action. (e)

Where an order has been made by a judge under the 36 & 37 Vict. c. 66, s. 57 (stated *supra*), the Court of Appeal has power to review such order, but it will not interfere except in a strong case, where it clearly thinks the judge has wrongly exercised his discretion, and that injustice has been done. (f)

The business referred to the official referees is distributed among them in rotation by the Chancery registrars' clerks, unless the order directs a reference to a particular referee, when regard will be had thereto. (g)

To obtain the name of the official referee in rotation the original order of reference, or a duplicate thereof, is taken

(a) 36 & 37 Vict. c. 66, s. 57.

(b) *Longman v. East*, *sup.*

(c) *Leigh v. Brooks*, 5 Ch. Div. 592; 46 L. J. 344, Ch.; 46 L. J. 344, Ch.; 25 W. R. 401.

(d) *Hoch v. Boor*, 49 L. J. 665, Q. B. 41; L. T. Rep. N. S. 425.

(e) *Ward v. Pilley*, 5 Q. B. Div.

427; 49 L. J. 705, Q. B.; 43 L. T. Rep. N. S. 301; 28 W. R. 937.

(f) *Ormerod v. The Todmerdon Joint Stock Mill Company*, 8 Q. B. Div. 664, C. A.; 51 L. J. 348, Q. B.; 46 L. T. Rep. N. S. 660; 30 W. R. 805.

(g) Ord. 36, rr. 45, 47.

to the registrar's clerk, who will indorse thereon the name of the official referee in rotation, and this order so indorsed is a sufficient authority to such official referee to proceed with the business. (a)

The referee may, subject to any order of the court or a judge, hold the trial at, or adjourn it to, any place which he may deem most convenient, and have an inspection or view, either by himself or with his assessors, if any, which he may deem necessary. And he must, unless otherwise ordered, proceed with the trial *de die in diem*, as in actions tried by a jury. (b)

Subject to the order of reference, evidence is to be taken at a trial before a referee, and the attendance of witnesses enforced by subpoena, and the trial is to be conducted in the same manner, as nearly as possible, as trials are conducted before a judge. He has also the same authority with respect to discovery and production of documents, and in the conduct of any reference or trial, and the same power to direct that judgment be entered for either party, as a judge of the High Court. But the referee has no power to commit any person to prison, or to enforce any order by attachment or otherwise. (c)

The referee may, before the conclusion of the trial, or by his report, under the reference, submit any question arising therein for the decision of the court, or state any facts specially, with power to the court to draw inferences therefrom, and in such case the order to be made on such submission or statement is to be entered as the court directs. (d)

A special referee, agreed upon between the parties, has the same powers and duties, and proceeds in the same manner as an official referee. (e)

The report of a referee must state the facts upon which it

(a) Ord. 36, r. 46.

(b) Ord. 36, r. 48.

(c) Ord. 36, rr. 49-51. Until these rules were made it had been held that the referee could not

compel a discovery, or direct judgment to be entered up.

(d) Ord. 36, r. 52.

(e) 36 & 37 Vict. c. 66, s. 57.

is based, but not the evidence. (a) Nor is the referee bound to give his reasons for his findings, and his report cannot be sent back to him for re-trial or for further consideration on that ground. (b)

The court may adopt the report on a reference for inquiry and report, either wholly or partially, and, if so adopted, it may be enforced as a judgment by the court. (c)

The report of a referee upon any question of fact on a reference for trial is, unless set aside by the court, equivalent to the verdict of a jury. (d)

The court may require any explanation or reasons from the referee, or may remit the cause or matter, or any part thereof, for re-trial or further consideration, to the same or any other referee, or the court may decide the question referred on the evidence taken before him, either with or without additional evidence. (e)

When a report is made by a referee, he must, on the same day, cause notice thereof to be given to all the parties to the trial or reference before him by prepaid post letter directed to the address for service of each party, who is, in due course of post, deemed to have notice of such report. (f)

Where, under the Judicature Act, 1873, s. 56, the referee's report has been made in a cause or matter, the further consideration of which has been adjourned, any party may, on the hearing of such further consideration, without notice of motion or summons, apply to the court or judge to adopt the report, or without leave of the court or a judge may give not less than four days' notice of motion, to come on with the further consideration, to vary the report or to remit the cause or matter, or any part of it, for re-hearing or further consideration to the same or any other referee. (g)

Where, under the same Act and section, the referee has

(a) 1 Alph. Pr. 772.

(b) *Miller v. Pilling*, 9 Q. B. Div. 736, C. A.; 51 L. J. 481, Q. B.

(c) 36 & 37 Vict. c. 66, s. 56.

(d) 36 & 37 Vict. c. 66, s. 58.

(e) Ord. 36, r. 52.

(f) Ord. 36, r. 53.

(g) Ord. 36, r. 54.

made his report in a cause or matter, the further consideration of which has not been adjourned, any party may, on giving eight days' notice of motion, apply to the court to adopt and carry into effect the report, or to vary it, or to remit the cause or matter, or any part of it, for re-hearing or further consideration, to the same or any other referee. (a)

The fee to be taken by an official referee is 5*l.*, collected by means of stamps, and if the sitting is not held in London additional fees are to be paid. The remuneration of a special referee is, in each case, to be determined by the court. The amount has been fixed at 5*l.* 5*s.* (b)

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(a) Ord. 36, r. 55.

| (b) 1 Alph. Pr. 773.

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## CHAPTER XIV.

### NEW TRIAL.

IF a party to the action thinks there has been a substantial wrong or miscarriage of justice at the trial on the grounds to be presently stated, he may move for a new trial, or to set aside the verdict, finding, or judgment.

Every motion for a new trial, or to set aside a verdict, finding, or judgment is to be made (1) where in a cause or matter there has been a trial without a jury (as in all ordinary Chancery actions) by appeal to the Court of Appeal; and (2) where there has been a trial thereof, or of any issue therein, with a jury, the application is to be made to a Divisional Court of the Queen's Bench Division (a); as where an action commenced in the Chancery Division has been tried by a jury before one of the judges of the Queen's Bench Division.

No judge is to sit on the hearing of any motion for a new trial in any cause or matter tried with a jury before himself. (b)

The application for a new trial is to be by notice of motion, which must state the grounds of the application, and whether all or part only of the verdict or finding is complained of; rules *nisi* for this purpose being now abolished. (c)

The notice is to be an eight days' notice, and must be served, if the trial took place in London or Middlesex, within eight days after the trial; and if the trial was else-

(a) See Ord. 39, r. 1; *et post*, tit. "Appeal."

(b) Ord. 39; r. 2.

(c) Ord. 39, r. 3.



where than in London or Middlesex, within seven days after the last day of sitting on the Circuits for England and Wales during which the trial took place. The times of the vacations are not to be reckoned in the computation of the time of serving the notice. (a)

As to the grounds of the motion : a new trial is not to be granted on the ground of misdirection, or of the improper admission or rejection of evidence, or because the verdict of the jury was not taken upon a question which the judge at the trial was not asked to leave to them, unless in the opinion of the court some substantial wrong or miscarriage has been thereby occasioned in the trial. And if it appears that such wrong or miscarriage affects part only of the matter in controversy, or some or one only of the parties, the court may give final judgment as to part or some one only of the parties, and direct a new trial as to the other part, or as to the other party or parties. (b) So a new trial may be ordered on any question whatever the grounds for the new trial may be, without interfering with the finding or decision upon any other question. (c)

A new trial is not to be granted by reason of the ruling of any judge that the stamp upon any document is sufficient, or that the document does not require a stamp. (d)

The notice of motion for a new trial may be amended at any time by leave of the court or a judge on such terms as may be just. (e)

Upon an application for a new trial the court may draw all inferences of fact not inconsistent with the finding of the jury, and if satisfied that it has before it all the materials necessary for finally determining the question in dispute, or for awarding any relief sought, give judgment accordingly, or if it has not sufficient materials before it to enable it to give judgment, may direct the motion to stand over for

(a) Ord. 39, r. 4.  
(b) Ord. 39, r. 6.  
(c) Ord. 39, r.

(d) Ord. 39, r. 8.  
(e) Ord. 39, r. 5.

further consideration, and direct such issues or questions to be tried or determined, or such accounts and inquiries to be taken and made, as it may think fit. (a)

As before stated, where the trial takes place before a judge of the Chancery Division, the party dissatisfied with the finding or judgment must apply to the Court of Appeal.

If upon the hearing of an appeal it appears that a new trial ought to be had, the Court of Appeal may, if it thinks fit, order that the verdict and judgment be set aside and a new trial be had. (b)

Where, in an action commenced in the Chancery Division, a judge of that division definitely finds a verdict on the facts in the action, and reserves judgment, the party dissatisfied with the finding or verdict, whatever may be the ground of objection, must appeal therefrom to the Court of Appeal within twenty-one days; as such finding or verdict is equivalent to an interlocutory order, which can only be appealed from within twenty-one days. (c)

So where an action in the Chancery Division is tried by a judge of that division, and definite issues of fact are settled at the commencement of the trial, then, whether the judge delivers his finding on the facts, and his judgment on the whole case on separate days or at one time, his finding of fact is an interlocutory order, and must be appealed from within twenty-one days. But, if no definite issues of fact are settled at the commencement of the trial, the finding of fact as well as the judgment on the whole case may be appealed from at any time within a year. (d)

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(a) Ord. 40, r. 10; *Dann v. Simons*, 41 L. T. Rep. N. S. 783.

(b) Ord. 58, r. 5.

(c) *Krehl v. Burrell*, 10 Ch. Div. 420; 48 L. J. 252, Ch.; 39 L. T. Rep. N. S. 461; 27 W. R. 234.

(d) *Lowe v. Lowe*, 10 Ch. Div. 432; 48 L. J. 361, Ch.; 40 L. T. Rep. N. S. 236; 27 W. R. 309; and see *Dolman v. Jones*, 12 Ch. Div. 553.

## CHAPTER XV.

## JUDGMENT.

By the 36 & 37 Vict. c. 66, s. 100, it is enacted that "judgment" shall include decree.

A judgment is a sentence or order of the court pronounced on hearing and understanding all the points in issue, and determining the rights of all the parties to the cause or matter. (a)

A judgment is either interlocutory or final; interlocutory, where the consideration of the particular question to be determined is reserved till a future hearing, as where the decree directs accounts to be taken or inquiries to be made; final, where, at the hearing of a cause, all the points may be disposed of at once on the materials before the court. (b)

No action or proceeding is open to objection because a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right without granting consequential relief. (c)

As to the mode of proceeding when the defendant fails to appear in the action, see *ante*, pp. 52, 53. And as to the steps the defendant may take when the plaintiff neglects to deliver a statement of claim when he is bound to do so, or to deliver a notice of trial, see *ante*, pp. 67, 136; and as to the proceedings by a plaintiff on the defendant making default in delivering a defence, see *ante*, pp. 53, 73.

In an action for the recovery of land, if the defendant does not deliver a defence within due time, the plaintiff may

(a) Dan. Pr. 785, 6th ed.

(b) *Ibid.*

(c) Ord. 25, r. 5; *et ante*, p. 70.

enter a judgment that the person whose title is asserted in the writ of summons recover possession of the land with his costs. (a) And where the claim extends to mesne profits, arrears of rent, &c., and the defendant makes default in pleading, the plaintiff may enter judgment. But it is only an interlocutory judgment, and he must proceed to assess the amount he is entitled to by writ of inquiry, or as the court or a judge directs. (b)

As to judgment on a counter-claim, see *ante*, p. 81.

Any party may, at any stage of the cause or matter, apply to the court or a judge for such judgment or order upon admissions of fact on the pleadings or otherwise as he may be entitled to, without waiting for the determination of any other question between the parties, which may be granted accordingly. (c) And the plaintiff is entitled to move for such judgment although he has delivered a reply to the statement of defence and set the action down for trial. (d)

As to the defendant entering up judgment after discontinuance by the plaintiff, see *ante*, p. 98.

As to judgment on a pleading in lieu of demurrer, or on a special case, see *ante*, pp. 100, 102.

As to judgment by default at the hearing, see *ante*, pp. 140, 141.

As before stated (*ante*, p. 142), at or after the trial of the action the judge may direct that judgment be entered for either party. But no judgment is to be entered after a trial without the order of a court or judge. (e)

Except where it is by the Procedure Acts or Rules of Court provided that judgment may be obtained in some other manner, the judgment of the court is to be obtained by motion for judgment. (f)

(a) Ord. 27, r. 7; and see hereon, *ante*, p. 53.

(b) Ord. 27, r. 8; and see rr. 4 and 5.

(c) Ord. 32, r. 6.

(d) *Brown v. Pearson*, 21 Ch. Div. 716; 46 L. T. Rep. N. S. 411; 30 W. R. 436.

(e) Ord. 36, r. 39.

(f) Ord. 40, r. 1.

Where at the trial the judge or referee abstains from directing any judgment to be entered the plaintiff may set down a motion for judgment; and if he does not do so and give notice thereof to the other parties within ten days after the trial, any defendant may set down a motion for judgment and give notice thereof to the other parties. (a) It is not usual, however, for a judge of the Chancery Division to abstain from ordering judgment to be entered.

Where, at or after a trial by a judge, he has directed that judgment be entered, any party may apply to set aside such judgment, and to enter any other judgment, on the ground that, upon the finding as entered, the judgment so directed is wrong. (b)

The application to so set aside the judgment must be made to the Court of Appeal; but if it is coupled with a motion for a new trial, where there has been a trial with a jury, the application must be to a divisional court. (c)

As stated *ante*, p. 144, a referee has now the same power to direct that judgment be entered for any or either party as a judge of the High Court. (d) And where at a trial by a referee he has directed that the judgment be entered, any party may move to set it aside and to enter any other judgment on the ground that upon the finding as entered the judgment is wrong. (e)

Where issues or questions of fact have been ordered to be tried or determined in any manner, the plaintiff may set down a motion for judgment as soon as they have been determined; and if he does not do so and give notice thereof to the other parties within ten days after this right arose, the defendant may set down a motion for judgment, and give notice thereof to the other parties. (f)

Where issues or questions of fact are so ordered to be tried or determined, and some only of them have been tried

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(a) Ord. 40, r. 2.

(b) Ord. 40, r. 4.

(c) Ord. 40, r. 5.

(d) Ord. 36, r. 50.

(e) Ord. 40, r. 6.

(f) Ord. 40, r. 7.

or determined, any party who considers that the result of such trial or determination renders the trial or determination of the others unnecessary, or desirable that the trial or determination thereof should be postponed, may apply to the court or a judge for leave to set down a motion for judgment without waiting for such trial or determination; and such leave may be given, if it appears expedient, and terms may be imposed, and directions also given, for postponing the trial of the other issues of fact. (a)

There must be two clear days between the service of a notice of motion and the day named for hearing, unless the court or a judge gives special leave to the contrary. (b)

Where leave to serve short notice of motion is asked for, this must be clearly stated to the court; and the notice served in accordance with leave given must also distinctly state that fact. (c)

No motion for judgment can be set down after the expiration of one year from the time when the party seeking to set down the same first became entitled to do so, without leave of the court or a judge. (d)

Upon a motion for judgment the court may draw all inferences of fact not inconsistent with the finding of the jury, and if it has all the materials before it, give judgment finally determining the questions in dispute, or any of them, or for awarding any relief sought; or, if it has not sufficient materials before it to enable it to give judgment, direct the motion to stand over for further consideration, and direct such issues or questions to be tried or determined, or such accounts and inquiries to be taken and made as are necessary. (e)

When the court has pronounced judgment or made an

(a) Ord. 40, r. 8.  
(b) Ord. 52, r. 5.  
(c) *Dawson v. Beeson*, 22 Ch. Div. 505; 31 W. R. 537; 48

L. T. Rep. N. S. 407; 52 L. J. 563, Ch.  
(d) Ord. 40, r. 9.  
(e) Ord. 40, r. 10.

order, which is usually done verbally in open court, it must be formally drawn up.

Notes of the judgment or order are, in the Chancery Division, taken down by the registrar sitting in court, and the different counsel engaged in the cause or matter also indorse their briefs with a short note of the effect of the judgment or order, and from these notes and such documents as are necessary the draft judgment or order is prepared.

The judgment or order must be first bespoken at the registrar's office. For this purpose the party bespeaking the same (that is, the solicitor having the carriage of the judgment or order) must, within seven days after it is pronounced or finally disposed of by the court or judge, leave with the registrar his counsel's brief, and such other documents as may be required by the registrar to enable him to draw up the same. And if these steps are not taken within the above time the registrar may decline to draw up the judgment or order without leave of the court or judge. (a)

The solicitor then calls at the registrar's office for the draft judgment or order, which is handed to him together with a written appointment of a time for settling the same, if it requires to be settled by the registrar in the presence of the parties; and a notice of this appointment must be served on the opposite party by leaving it at his address for service, or by transmitting it to him by post, one clear day at least before the time so fixed. The original appointment is usually indorsed with the fact of service and signed by the person effecting it, and delivered to the registrar to satisfy him that service of notice of the appointment was duly effected. (b)

The parties attend on the day fixed with the necessary papers, and the draft is settled, and the registrar names a time in the presence of the parties, or delivers out a written

(a) Ord. 62, rr. 4, 5, 6.

(b) Ord. 62, rr. 7-10; 1 Alph. Pr. 474, 475.

appointment of a time for passing the judgment or order, and in the latter case notice of this appointment must be served on the opposite party, as in the case of the notice to settle the draft judgment or order. (a)

The judgment or order must next be entered by the entering clerk, for which purpose the party must leave with him a copy of the pleadings in the action (other than petitions and summonses), which must be printed, except so far as the originals are permitted to be written. (b)

If a party fails to attend the appointment for settling or passing the judgment or order, or neglects to produce his briefs and such other documents as the registrar may require, the draft may be settled or the judgment or order may be passed, notwithstanding such default or neglect, or the registrar may require the matter to be mentioned to the court or judge. (c)

The registrar may adjourn any appointment for settling the draft or passing the judgment or order to such time as he thinks fit, and the parties attending the appointment are bound to attend the adjournment without further notice. (d)

So the registrar has power, in any case in which he may think it expedient to do so, to settle and pass the judgment or order, without making any appointment for either purpose, and without notice to any party. (e)

If, after the registrar has drawn the draft judgment or order, the parties cannot agree with each other, or with him, as to what the judgment or order was intended to be, the party or parties dissatisfied may, at his peril as to costs, apply to the court by motion on notice to have the minutes varied, or obtain leave to put the cause again in the paper in order that it may be what is termed "spoken to on the minutes." All applications to vary a judgment or order must be made to the judge who pronounced it. (f)

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(a) Ord. 62, r. 11; Ord. 41, r. 1;  
and see further, rules 2, 4, 5.

(b) Ord. 41, r. 1; Ord. 62, r. 2.

(c) Ord. 62, r. 12.

(d) Ord. 62, r. 13.

(e) Ord. 62, r. 14.

(f) See 1 Alph. Pr. 475.



If the plaintiff's solicitor, having the carriage of a judgment or order, unduly delay the prosecution of it, some other party to the cause or matter may apply to the court or judge to require such solicitor to explain the delay, and in default that the conduct of the suit may be given to some other party, or to the official solicitor. (a)

A judgment will now generally take effect from the time it is pronounced, for it is provided that where a judgment is pronounced in court the entry of the judgment is to be dated as of the day on which such judgment is pronounced, unless the court or judge otherwise order, and the judgment is to take effect from that date; but by special leave of the court or a judge a judgment may be ante-dated or post-dated. And in all other cases the entry will be dated as of the day on which the requisite documents are left with the officer for the purpose of entry, and the judgment take effect from that date. (b) But an order made on an interlocutory application takes effect from its date unless otherwise directed by the court or a judge. (c)

And every judgment or order requiring any person to do an act thereby ordered must state the time, or time after service thereof, within which the act is to be done, and upon the copy of the judgment or order which is to be served upon the person required to obey it there must be indorsed a memorandum that if such person neglects to obey the judgment or order he will be liable to process of execution for the purpose of compelling obedience thereto. (d) See also *post*, p. 159.

Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court or a judge on motion or summons without an appeal. (e)

(a) See Ord. 33, r. 9; *Vanderwell v. Vanderwell*, 1 L. T. Rep. N. S. 266; and as to a judgment directing accounts and inquiries see *post*, "Proceedings in Chambers."

(b) Ord. 41, rr. 3, 4; see also

*Re Risca Coal Company*, 8 Jur. N. S. 900.

(c) Ord. 52, r. 13; and see *post*, p. 174.

(d) Ord. 41, r. 5.

(e) Ord. 28, r. 11.

Enrolment of a judgment or order is no longer necessary. (a) Nor is an order necessary to enter a judgment *nunc pro tunc*; a written memorandum countersigned by a Chancery registrar, and bearing the proper fee stamp, is left by the solicitor for this purpose with the clerk of entries. (b)

We have shown (*ante*, pp. 20, 21), in certain cases, chiefly for administration purposes, a party may sue or be sued, as representing a class, without making the other persons interested parties to the action; but the persons who, according to the former practice, would have been necessary parties to the suit are, if so ordered by the court or a judge, to be served with notice of the judgment or order, and are then bound thereby; and the parties so served are at liberty to attend the proceedings under the judgment or order, and may apply to the court or judge to discharge, vary, or add to such judgment or order. (c)

Notice of a judgment or order on an infant or person of unsound mind not so found by inquisition must be served in the same manner as a writ of summons in an action. (d)

A judgment by default may be set aside by the court or a judge upon such terms as to costs or otherwise as such court or judge may think fit. (e) And, as before shown, where a judge at or after the trial directs judgment to be entered, any party may apply to the Court of Appeal to set such judgment aside, and to enter any other judgment. (f)

Where a person who has obtained any judgment or order upon condition does not perform or comply with such condition, he is to be considered to have waived or abandoned such judgment or order so far as it is beneficial to himself, and any other person interested in the matter may, on breach or non-performance of the condition, take such proceedings as the judgment or order may warrant, or such proceedings as

(a) Ord. 61, r. 8.

(b) Ord. 52, r. 15.

(c) See Ord. 16, rr. 32-40.

(d) Ord. 16, r. 44.

(e) See Ord. 27, r. 15; Ord. 36, r. 33; and see *Jaques v. Harrison*, 32 W. R. 476; 12 Q. B. Div. 165.

(f) Ord. 40, rr. 4, 5.

might have been taken if no such judgment or order had been made, unless the court or a judge otherwise directs. (a)

If final judgment is pronounced in an action to which an infant is a party, he is, if a plaintiff, as much bound by the judgment as a person of full age, and can only dispute it on the same grounds as an adult might dispute it, such as fraud, collusion, or error. Formerly, if the decree directed real estate of an infant to be sold or conveyed, the execution of the decree was necessarily deferred until he came of age; and in such cases it was the practice to insert in the decree a clause giving the infant a day to show cause against it within a time fixed after he came of age. (b) The court is now, however, by the 13 & 14 Vict. c. 60, ss. 29, 30, enabled to deal with the real estate of infants, and the only case in which it appears necessary to insert in a judgment against an infant defendant a clause giving him six months after he comes of age to show cause against it, is in the case of a foreclosure action. (c) When the infant has a day so given the plaintiff's solicitor must, upon the infant's coming of age, issue and serve upon him a subpoena to show cause. If he does not appear to the subpoena within the time limited, the judgment will be made absolute upon an *ex parte* motion supported by evidence of the infant having attained twenty-one, of service of the subpoena, and of the registrar's certificate of no cause shown. (d)

(a) Ord. 42, r. 2.

(b) 1 Dan. Pr. 177 *et seq.*, 6th ed.; Dan. Forms, pp. 51-53, 3rd ed.

(c) *Gray v. Bell*, 46 L. T. Rep. N. S. 521; 30 W. R. 606; *Price v.*

*Carver*, 3 My. & Cr. 157; *Mellor v. Porter*, 25 Ch. Div. 158; 50 L. T. Rep. N. S. 49; 53 L. J. 178, Ch.

(d) 1 Dan. Forms, pp. 51 *et seq.*, 3rd ed.

## CHAPTER XVI.

## THE ENFORCEMENT OF JUDGMENTS.

A JUDGMENT or order of the court or a judge is enforced by writ of execution. (a)

The term "writ of execution" is to include writs of *fiery facias*, *capias*, *elegit*, sequestration and attachment, and all subsequent writs that may issue for giving effect thereto. And the term "issuing execution against any party" means the issuing of any such process against his person or property as, under the Rules of Court, are applicable to the case. (b)

Where a judgment or order directs the payment of money, or the delivery up or transfer of property, real or personal, it is not necessary to make any demand thereof, but the person so directed is bound to obey the judgment or order upon being duly served with the same without demand. (c)

An order may be enforced not only by or against the parties to the action, but also by or against a person not a party, in whose favour, or against whom, an order is made, by the same process as if he were a party to the action. (d)

In certain cases leave of the court or a judge is necessary before execution can issue on a judgment. (e)

Thus, where a judgment is given in favour of any party subject to or upon the fulfilment of any condition or contingency, such party cannot, on its fulfilment, issue execution without leave, and the court or judge, upon application made and upon proof of the fulfilment of the condition or con-

(a) See Ord. 42, rr. 3-7, 24.

(b) Ord. 42, r. 8.

(c) Ord. 42, r. 1.

(d) Ord. 42, r. 26.

(e) Ord. 42, rr. 9, 10; Ord. 43, r. 7; Ord. 44, r. 2.

tingency and demand made upon the party against whom he is entitled to relief, may either grant such leave, or direct that any issue or question necessary for the determination of the rights of the parties be tried. (a)

And if a party who has obtained a judgment or order against a firm claims to be entitled to issue execution against any other person as being a member of the firm, he should apply to the court or judge for leave to do so, as will be shown more fully hereafter. (b)

And, unless by leave of the court or a judge, no sequestration to enforce payment of costs can issue. (c) So, no writ of attachment can be issued without leave of the court or a judge, to be applied for on notice given to the party against whom such attachment is asked for. (d) But the order, if made, is absolute in the first instance, as a rule *nisi* for this purpose is abolished. (e)

And although, as between the original parties to the judgment or order, execution may issue at any time within six years from the recovery of the judgment or the date of the order; yet after this period, or if any change has taken place by death or otherwise in the parties entitled or liable to execution; or where a husband is entitled or liable to execution upon a judgment or order for or against a wife; or where a party is entitled to execution upon a judgment of assets *in futuro*; or where a party is entitled to execution against any of the shareholders of a joint-stock company upon a judgment recorded against such company, or against a public officer or other person representing such company, the party alleging himself to be entitled to execution may apply to the court or a judge for leave to issue execution, which may be granted accordingly, or an order may be made that any issue or question necessary for the determination of

(a) Ord. 42, r. 9.

(b) Ord. 42, r. 10.

(c) Ord. 43, r. 7.

(d) Ord. 44, r. 2; and see *Thomas v. Palin*, 21 Ch. Div. 361; 30 W. R. 716.

(e) Ord. 52, r. 2.

the rights of the parties be tried; and in either case the court or judge may impose such terms as to costs or otherwise as may be just. (a)

A writ of execution must issue from the Central Office in London, unless the action proceeds in a district registry, in which case the writ of execution issues from the district registry, unless the court or a judge otherwise orders. (b)

Before a writ of execution is issued the judgment or order upon which the writ of execution is to issue, or an office copy of it, showing the date of entry, must be produced to the proper officer, who must be satisfied that the time has elapsed to entitle the judgment creditor to execution. (c) And a *præcipe*, containing the title of the action, the reference to the record, the date of the judgment, &c., and the name of the execution debtor, must be signed by or on behalf of the solicitor of the party issuing it, or by such party, if he acts in person, which must then be filed. (d)

A writ of execution must bear date of the day on which it is issued; and be indorsed with the name and place of abode or business of the solicitor issuing it, and if he be agent only, also with name and place of abode of the principal solicitor; and if the writ is issued by a party in person, it must be indorsed to that effect, and giving the city, town, or parish, and the name of the hamlet or street, and the number of the house of such party's residence, if there be any such. (e)

And where the writ is for the recovery of money, it must be indorsed with a direction to the sheriff or other officer or person to whom it is directed, to levy the money due and payable under the judgment or order, stating the amount, and interest thereon, if sought to be recovered, at 4*l.* per cent. per annum, from the time the judgment or order was entered or made, or at such rate as the parties agreed on, if more than 4*l.* per cent. interest was specified. (f)

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(a) Ord. 42, rr. 22, 23.

(b) Ord. 35, rr. 4, 5; Ord. 61.

(c) Ord. 42, r. 11.

(d) Ord. 42, r. 12.

(e) Ord. 42, rr. 13, 14.

(f) Ord. 42, r. 16.

The amount of poundage, fees, and expenses of the execution over and above the sum recovered may be levied. (a)

A writ of execution will, if unexecuted, remain in force for one year only from its issue, unless renewed; but it may, at any time before its expiration, by leave of the court or a judge, be renewed by the party issuing it for one year from the date of such renewal, and so on from time to time during the continuance of the renewed writ, either by being marked with the seal of the court bearing the date of renewal, or by such party giving a written notice of renewal to the sheriff, signed by the party or his solicitor, and bearing the seal of the court. The writ of execution so renewed has effect and is entitled to priority according to the time of the original delivery thereof. Production of the writ or notice properly sealed is sufficient evidence of its renewal. (b)

Where a judgment or order is against a firm, execution may issue (1) against the partnership property; or (2) against any person who has appeared in his own name, or admits by the pleadings that he is, or has been adjudged to be, a partner; or (3) against any person served as a partner with the writ of summons, and who failed to appear. If the judgment creditor claims to be entitled to issue execution against any other person as being a member of the firm, he should apply to the court or a judge for leave to do so; and the court or a judge may grant such leave if the liability be not disputed, or, if the liability be disputed, order that such liability be tried and determined in the manner in which any issue in an action may be tried and determined. (c)

A judgment or order for the recovery or payment of a sum of money and costs may be enforced by one or separate writs of execution, but the second writ must only be for the costs, and issued not less than eight days after the first writ. (d)

A judgment or order for the payment of money or costs

(a) Ord. 42, r. 15.  
(b) Ord. 42, rr. 20, 21.

(c) Ord. 42, r. 10; and see Ord. 12, r. 15.  
(d) Ord. 42, r. 18.

may be enforced by one or more writs of *fiery facias*, or one or more writs of *elegit*, but if the judgment or order is for payment within a period therein mentioned, no writ of execution can issue until after the expiration of such period; and the court or a judge may stay execution until such time as may be thought fit. (a)

No *subpœna*, however, for the payment of costs, and unless by leave of the court or a judge, no sequestration to enforce such payment, can be issued. (b)

A judgment for the payment of money *into court* may be enforced by writ of sequestration, or by writ of attachment, where attachment is authorised by law. (c)

A judgment for the recovery or for the delivery of the possession of land may be enforced by writ of possession. (d) A judgment for foreclosure absolute is not a judgment for the recovery of possession of land within the meaning of this rule. (e)

A judgment for the recovery of any property other than land or money may be enforced by (1) writ of delivery, (2) by writ of attachment, and (3) by writ of sequestration. (f)

Where a writ of delivery is sought to enforce a judgment or order for the recovery of property other than land or money, execution may be ordered to issue for the recovery of the property without giving the defendant the option of retaining the property upon paying its assessed value. The plaintiff may, however, at his option, have execution for the assessed value. (g)

Wilful disobedience of a judgment or order by a corporation may, by leave of the court or a judge, be enforced by sequestration or attachment. (h)

A judgment requiring any person to do any act other than

(a) Ord. 42, r. 17.

(b) Ord. 43, r. 7.

(c) Ord. 42, r. 4.

(d) Ord. 42, r. 5; Ord. 47.

(e) *Wood v. Wheeler*, 22 Ch. Div.

281; 52 L. J. 144, Ch.; 47 L. T. Rep. N. S. 440; 31 W. R. 117.

(f) Ord. 42, r. 6.

(g) Ord. 48, r. 1.

(h) Ord. 42, r. 31.



the payment of money, or to abstain from doing anything, may be enforced by writ of attachment, or by committal. (a)

As before stated, no writ of attachment can issue without leave of the court or a judge to be obtained on notice of motion (see *ante*, p. 160). The notice of motion must state generally the grounds of the application, and, if supported by affidavit, a copy thereof must be served with the notice of motion. (b) Under this writ the disobedient party is arrested by the sheriff's officer; after which he is brought before the court to answer his contempt, and he may be committed to prison until he clears his contempt. (c)

A party who has obtained a judgment or order, not being a judgment for the payment of money or costs, or for the recovery of land, may issue execution in fourteen days, unless the court or a judge orders execution to issue at an earlier or later date, with or without terms. (d)

Writs of execution may be issued in the same order as heretofore (e); and writs of *feri facias* and *elegit* are to have the same force and effect (except as stated *infra*), and to be executed in the same manner, as the like writs heretofore had, or were executed. (f)

A writ of *feri facias* authorises the sheriff to seize the goods and chattels of the judgment debtor, and if necessary to sell them, the sale to be by public auction if the execution exceeds 20*l*. By virtue of a writ of *elegit* the sheriff summons a jury, who appraise or value the debtor's lands and tenements, after which the lands and tenements are delivered to the execution creditor. (g) The goods of a debtor can no longer be taken in execution under an *elegit*. (h)

As to obtaining an order for the sale of the lands delivered in execution, see 27 & 28 Vict. c. 112, s. 4.

(a) Ord. 42, r. 7.

(b) See Ord. 52, r. 4; *Litchfield v. Jones*, 25 Ch. Div. 65.

(c) See further, 1 Alph. Pr. 361, &c.; Ayck. Pr. 64, &c.; Ord. 52, r. 11.

(d) Ord. 42, r. 19.

(e) Ord. 42, r. 29.

(f) Ord. 43, r. 1.

(g) 1 Alph. Pr. 348-352; 13 Edw. 1, c. 18; 46 & 47 Vict. c. 52, r. 145.

(h) 46 & 47 Vict. c. 52, ss. 146, 169, and sched. 5.

If a *mandamus*, mandatory order, injunction, or judgment for the specific performance of a contract be not complied with, the court or a judge, besides or instead of proceedings against the disobedient party for contempt, may direct that the act required to be done may, so far as is practicable, be done by the party by whom the judgment or order has been obtained, or by some other person appointed by the court or a judge at the cost of the disobedient party, and upon the act being done, and the expenses incurred ascertained, execution may be ordered to issue for that amount and costs. (a)

We have already stated in what events a writ of sequestration may issue, and it is further provided that where a person is by a judgment or order directed to pay money into court, or to do any other act in a limited time, and after service of such judgment or order refuses or neglects to obey the same, the person prosecuting the judgment or order is, at the expiration of the time limited for the performance thereof, entitled, without any further order, to issue a writ of sequestration against the estate and effects of such disobedient person. (b) But, as before shown, no sequestration to enforce payment of costs can be issued without leave of the court or a judge. (c)

The writ is issued in the mode pointed out, *ante*, p. 161; and in addition to the requisites there specified, evidence must be produced showing the service of the judgment or order and disobedience thereof, if leave is necessary before the writ issues, and the order giving such leave must also be produced to the proper officer. The writ, when issued, is delivered to the sequestrators, who execute the writ by taking the goods and chattels in the possession of the disobedient person and such things as pass by delivery, and by receiving the rents and profits of his lands. The proceeds are paid into court, and the person issuing the sequestration applies

(a) Ord. 42, r. 30.

(b) Ord. 43, r. 6.

(c) Ord. 43, r. 7.

to have the proceeds applied in satisfaction of his demand. When the disobedient party has cleared his contempt he may apply to the court or a judge for an order to discharge the writ. (a)

A discovery may be sought in aid of execution; hitherto such discovery has only been resorted to in aid of attachment of debts owing to a judgment debtor. It is provided that, where a judgment or order is for the recovery or payment of money, the party entitled to enforce it may apply to the court or a judge for an order that the debtor liable under the judgment or order, or in case of a corporation, that any officer thereof, be orally examined, as to whether any and what debts are owing to the debtor, and whether the debtor has any and what other property or means of satisfying the judgment or order, before a judge, or an officer of the court; and an order may be made for the attendance and examination of such debtor, or of any other person, and for the production of any books or documents. (b)

And in case of a judgment or order other than for the recovery or payment of money, if any difficulty arises as to its execution or enforcement, any party interested may apply to the court or a judge for an order for the attendance and examination of any party or otherwise as may be just. The costs of these applications, and proceedings incidental thereto, are in the discretion of the court or judge, or in that of the officer, if so directed by the court or a judge. (c)

The court or a judge may, either before or after any oral examination of the debtor liable under a judgment or order for payment of money, upon the *ex parte* application of the person who has obtained the judgment or order, supported by an affidavit of himself or his solicitor stating that judgment has been recovered, or the order made, and that it is still unsatisfied, and to what amount, and that some other person is indebted to such debtor, and is within the jurisdiction,

(a) 1 Alph. Pr. 353-356.  
(b) Ord. 42, r. 32.

(c) Ord. 42, rr. 33, 34.

order that all debts owing or accruing from such third person (called the garnishee) to such debtor be attached to answer the judgment or order; and it may also be ordered that the garnishee appear before the court or a judge, or officer of the court, to show cause why he should not pay to the person who has obtained the judgment or order the debt due from him to such debtor, or so much as may be sufficient to satisfy the judgment or order. (a)

As a general rule all existing debts due to the judgment debtor, legal or equitable, though the time of payment has not arrived, may be attached; but not unliquidated damages. (b)

The expression "debts accruing" in the above rule, means *debitum in præsentī solvendum in futuro*. Therefore, where a judgment debtor was entitled for his life to the income arising from a fund vested in trustees payable half-yearly, and on an application made to attach the debtor's share of the income in the hands of the trustees it appeared that the last half-yearly payment had been made, and there was no money, proceeds of the trust property, in the hands of the trustees, it was held by the Court of Appeal that there was no debt "owing or accruing" at the time the order was applied for which could be attached; and that the only way of reaching the income was to apply for a receiver. (c)

By the 33 & 34 Vict. c. 30, no order for the attachment of the wages of any servant, labourer, or workman can be made by any court of record or inferior court.

A secretary and accountant to a harbour tramways company, at a salary of 200*l.* a year, is not a servant within the meaning of this Act. (d)

(a) Ord. 45, r. 1.

(b) 1 Alph. Pr. 357.

(c) *Webb v. Stenton and others*, Garnishees, 11 Q. B. Div. 518; 52 L. J. 584, Q. B.; 49 L. T. Rep. N. S. 432, C. A.; see also *Westhead v.*

*Riley*, 25 Ch. Div. 413; 32 W. R. 273.

(d) *Gordon v. Jennings; Cardiff, &c., Harbour Tramways Company*, Garnishees, 9 Q. B. Div. 45; 46 L. T. Rep. N. S. 534; 51 L. J. 417, Q. B.; 30 W. R. 704.

And where a judgment debtor had become absolutely entitled under 11 & 12 Vict. c. 14, s. 2, to a superannuation pension, payable quarterly by the garnishee, in respect of twenty years' service as a police constable, it was held that this pension was not protected by the 33 & 34 Vict. c. 30. Further, that to the extent of the payment or instalment which was due to the judgment debtor from the garnishee at the date the summons was issued, such payment or instalment was subject to attachment. (a)

It seems also that the 33 & 34 Vict. c. 30, applies only to inferior courts. (b)

Service of the attachment order, or notice thereof to the garnishee, in such manner as the court or judge directs, binds the debts in the garnishee's hands. (c)

If the garnishee does not forthwith pay into court the debt due from him to the debtor liable under the judgment or order, or an amount equal to the judgment or order, or dispute the debt, or appear upon summons, the court or a judge may order execution to issue against him without any previous writ or process. But if the garnishee disputes his liability, the court or judge may order any issue or question necessary for determining his liability to be tried or determined in any manner in which any issue or question in an action may be tried or determined. (d)

If the garnishee suggests that the debt sought to be attached belongs to some third person, or that any third person has a lien or charge upon it, the court or a judge may order such third person to appear and state the nature and particulars of his claim upon such debt. And after hearing him and any other person ordered to appear, or if such third person does not appear when ordered, execution may be ordered to issue to levy the amount due from the garnishee,

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(a) *Re Hayson; Booth v. Trail and others, Mayor, &c., of Sunderland*, Garnishee, 12 Q. B. Div. 8; 49 L. T. Rep. N. S. 471; 53 L. J. 24, Q. B.

(b) *Ibid.*, per Stephen, J.

(c) Ord. 45, r. 2.

(d) Ord. 45, rr. 3, 4.

or any issue or question may be ordered to be tried, and the claim of such third person may be barred, or such other order may be made upon such terms with respect to the lien or charge (if any) of such third person, and as to costs, as the court or a judge may think just. (a)

Payment by, or execution levied upon, the garnishee under any such proceeding as above detailed, is a valid discharge to him as against the debtor liable under the judgment or order, to the amount paid or levied, even though such proceeding may be set aside, or the judgment or order reversed. (b)

Another mode of proceeding that may be taken by a judgment creditor on his judgment is by way of charging order. For this purpose he may apply to the court or a judge for an order that any Government stock, funds, or annuities, or any stock or shares in any public company in England, standing in the name of the debtor in his own right or in the name of any other person in trust for him in possession or reversion, vested or contingent, may be charged with the payment of the judgment debt and interest thereon. The order is made in the first instance *ex parte* without notice to the judgment debtor, and is an order to show cause, but restrains the transfer of the stock, &c. Unless, however, the judgment debtor shows cause to the contrary, the order will, on proof of notice thereof to the judgment debtor or his attorney or agent, be made absolute; and it then entitles the judgment creditor to the same remedies as if the charge had been made in his favour by the judgment debtor. The charge cannot be enforced until after the expiration of six calendar months from the date of the order. (c)

(a) Ord. 45, rr. 5, 6.

(b) Ord. 45, r. 7.

(c) See 1 & 2 Vict. c. 110, ss. 14, 15; 3 & 4 Vict. c. 82, s. 1; Ord. 46, r. 1.

A fund in court may be restrained from payment out by stop-order;

and formerly a writ of *distringas* might have been issued to prevent the transfer of stock, but this writ is now, by Rules of Court of 1883, abolished, and a proceeding by affidavit and notice substituted: (see Ord. 41, r. 2 *et seq.*)

We have now traced the course of an action in the Chancery Division of the High Court, from the issue of the writ of summons to the execution of the judgment, in the order in which such proceedings usually occur, omitting, for convenience, the general rules as to costs, which will be treated of in a subsequent chapter. There are also many interlocutory applications made in the course of an action which must be considered. The judgment, too, in an action in the Chancery Division is, from the nature of the actions tried there, seldom final in the first instance, but directs accounts to be taken or inquiries to be made, which are usually taken and made before one of the chief clerks attached to the judges of the Chancery Division, or before a district registrar, or before a referee or other officer of the court.

These proceedings we will next proceed to consider in their order.

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CHAPTER XVII.

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## INTERLOCUTORY APPLICATIONS, &amp;c.

As stated *ante*, p. 60, interlocutory applications are made to the court by motion or petition, and to a judge at chambers by summons. We will now treat of these applications.

## SECTION I.

## MOTIONS.

When no long statement is required in addition to the pleadings in an action to indicate the point to be decided, the application for the order required should be made to the court by motion. (a) This rule is, however, not always a competent guide in determining whether, in any particular case, proceeding by motion will be proper; the practitioner must trust to his experience alone. (b)

Motions may be divided into two kinds: (1) Special motions; and (2) motions of course.

No motion for a rule *nisi* or order to show cause can now be made in any action. (c)

Special motions must be made to the court and be supported by evidence, and it is in the discretion of the court either to grant or refuse the application. Special motions are also divided into two classes, those which are made *ex parte* and those which require notice to be given to the parties against whom they are made. A motion is ordinarily only allowed to be made *ex parte* where the rules of court so provide, or the court is satisfied that the delay caused by

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(a) Dan. Pr. 1542, 6th edit.;  
Will. Pet. 2; Ord. 52, r. 1.

(b) Hunt. Suit, 121, 2nd ed.;  
Will. Pet. 2.

(c) Ord. 52, r. 2.



proceeding in the ordinary way would or might cause irreparable or serious mischief, as where it is for an injunction to restrain a threatened injury. And the order may be made on such terms as to costs and subject to such undertaking, if any, as the court may think just. Motions on notice can only be made on the days appointed for motions; an *ex parte* motion, however, is not limited to the ordinary motion days, but may be made any day in or out of term. (a)

There must, unless the court or a judge give special leave to the contrary, be at least two clear days between the service of a notice of motion and the day named in the notice for hearing the motion. (b) This notice may, by leave of the court or a judge, to be obtained *ex parte*, be served upon the defendant at the same time as the writ of summons is served, or after service of the writ and before the expiration of the time limited for appearance. (c)

The notice should state the day on which, and the judge before whom, the motion is to be made. (d) If on the hearing of a motion the court or judge is of opinion that any other person to whom notice has not been given ought to have notice, such court or judge may dismiss the motion, or adjourn it in order that notice may be given upon such terms, if any, as may be imposed. (e)

If the defendant, after being served with a writ of summons, makes default in appearance, the plaintiff may, without special leave, still serve the notice of motion upon the defendant. (f) All notices in respect of which personal service is not required are sufficiently served if left within the prescribed hours (see *ante*, p. 63) at the address for service of the person to be served, and with any person resident at or belonging to such place. (g)

Where no appearance has been entered for a party, or

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(a) See Dan. Pr. 1546, *et seq.*, 8th edit.; Ord. 52, r. 3.

(b) Ord. 52, r. 5.

(c) Ord. 52, r. 9.

(d) 1 Alph. Pr. 548.

(e) Ord. 52, r. 6.

(f) Ord. 52, r. 8.

(g) Ord. 67, r. 2.

where a party or his solicitor has omitted to give an address for service, all notices in respect of which personal service is not requisite may be served by filing them with the proper officer. (a)

Where personal service of the notice is required the service is to be effected as nearly as may be in the manner prescribed for personal service of a writ of summons, (b) as to which see *ante*, p. 41; but if it is made to appear to the court or judge that prompt personal service cannot be effected, the court or a judge may make such order for substituted or other service, or for the substitution of notice for service by letter, public advertisement, or otherwise, as may be just. (c)

Where a party, after having sued or appeared in person, has given written notice to the opposite party or his solicitor, through a solicitor, that such solicitor is authorised to act in the cause or matter on his behalf, all notices which ought to be served upon the party on whose behalf the notice is given are to be served upon such solicitor. (d)

Affidavits of service must state when, where, and how, and by whom, service was effected. (e)

The motion is heard in court in its proper order, usually in the order of seniority of the counsel engaged in it. (f) Upon the hearing of a motion evidence may be given by affidavit; but the court or a judge may, on the application of either party, order the attendance of any person who has made an affidavit for the purpose of being cross-examined. (g)

The order made at the hearing of a motion is, when necessary, drawn up, passed and entered in the same manner as a judgment, as to which see *ante*, p. 154.

Where an order has been made not embodying any special

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| <p>(a) Ord. 67, r. 4.<br/>                 (b) Ord. 67, r. 5.<br/>                 (c) Ord. 67, r. 6.<br/>                 (d) Ord. 67, r. 7.<br/>                 (e) Ord. 67, r. 9. This and the preceding five rules of this order,</p> | <p>numbered 2, 4, 5, 6, 7, also apply to the service of writs, pleadings, orders, summonses, documents, and written communications.<br/>                 (f) 1 Alph. Pr. 551.<br/>                 (g) Ord. 38, r. 1.</p> |
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terms or directions, but simply enlarging time for taking any proceeding or doing any act, or giving leave for the issue of any writ (other than a writ of attachment), or for the amendment of any writ or pleadings, or for the filing of any document, or for any act to be done by any officer of the court other than a solicitor, it is not necessary to draw up such order, unless the court or a judge otherwise directs; but the production of a note or memorandum of such order signed by a judge, registrar, master, chief clerk, or district registrar, is to be sufficient authority for such enlargement of time, issue, amendment, filing, or other act. (a)

And a direction that the costs of such order are to be costs in a cause or matter is not to be deemed a special direction within the meaning of this rule. (b)

The solicitor of the person on whose application the order is made must forthwith give written notice thereof to such person (if any) as would, if this rule had not been made, have been required to be served with such order. (c)

Every order, if and when drawn up, is to be dated the day of the week, month, and year on which the same was made, unless the court or a judge otherwise directs, and is to take effect accordingly. (d) Except in the case of an order for an attachment it is not necessary to the regular service of an order that the original order be shown if an office copy of it be exhibited. (e)

The following are some instances of applications that may be made to the court by special motion: for an injunction or *mandamus*; for the appointment of a receiver; (f) to dismiss the action for want of prosecution; (g) for judgment on admissions in the pleadings or otherwise; (h) for a new trial; (i) for a writ of *ne exeat regno*; for a commission to

(a) Ord. 52, r. 14.

(b) Ord. 52, r. 14.

(c) Ord. 52, r. 14.

(d) Ord. 52, r. 13.

(e) Ord. 67, r. 1.

(f) 36 & 37 Vict. c. 66, s. 25, sub-s. 8.

(g) Ord. 27, r. 1.

(h) Ord. 32, r. 6.

(i) Ord. 39.

take evidence abroad; for the preservation of property pending litigation, &c.

The instances here enumerated, with the exception of applications for an injunction, a *mandamus*, a receiver, a writ of *ne exeat regno*, and for the preservation of property pending litigation, have already been considered in preceding pages.

An *injunction* is a judicial order requiring a party to do or omit doing a particular act. No writ of injunction can now be issued, a judgment or order being substituted. The court has power to grant an injunction in any cause or matter in which it has been or might have been properly claimed. (a) But where an injunction is the substantial object of the action the writ should be indorsed with a claim for it. (b)

No action in any division of the High Court can be now restrained by injunction granted by any other division. Full provision is, however, made for the court to stay proceedings in any cause pending before it; as also for pleading any equitable matter in the action, which formerly would have been ground for obtaining an injunction against the prosecution of such action. (c)

An application for an injunction may be made by any party, and if by a plaintiff, it may be made either on notice or *ex parte*. (d) It will only be granted on an *ex parte* motion in cases of great urgency. (e) Leave of the court or judge may, however, be obtained *ex parte* to serve the writ of summons, and notice of motion for the injunction at the same time and for a particular day. (f) If the

(a) See 36 & 37 Vict. c. 66, s. 25, sub-s. 8; Ord. 50, rr. 11, 12.

(b) *Colebourne v. Colebourne*, 1 Ch. Div. 690; 43 L. J. 749, Ch.; 24 W. R. 235; *Norton v. Gover*, W. N., 1877, p. 206.

(c) 36 & 37 Vict. c. 66, s. 24, sub-s. 5. The Court of Bankruptcy may restrain actions, &c., against

the debtor at any time after presentation of the petition in bankruptcy: (46 & 47 Vict. c. 52, s. 10, sub-s. 2.)

(d) Ord. 50, r. 6; Ord. 52, r. 3.

(e) 1 Alph. Pr. 434; *Ayck. Pr.* 286, 9th ed.

(f) *Ibid*; Ord. 52, rr. 5, 9.

motion for an injunction is made by a defendant it must be after appearance and on notice to the plaintiff. (a)

The evidence adduced in support of the motion is generally by affidavit. And where the motion is *ex parte* the party making it must furnish copies of the affidavit upon which it is granted, upon a written request and undertaking to pay the proper charges for them. (b)

No order made *ex parte* in court founded on any affidavit is to be of any force unless such affidavit was actually made before the order was applied for and produced or filed at the time of making the motion, except by leave of the court or a judge. (c)

The court may make the order either unconditionally, or upon such terms and conditions as may be just. (d)

Where a defendant has had notice of motion for an injunction, the order for it will not be made *ex parte*. An interlocutory order for the injunction is usually made upon an undertaking to abide by any order the court may make as to the payment of damages (if any) resulting from the other party being restrained. (e)

The party against whom an order for injunction is made may apply to the court on notice of motion to discharge it. (f)

As soon as the judgment or order for the injunction has been made it has the effect which the writ of injunction formerly had. (g)

The order should be served as soon as possible; but if it is drawn up, passed and entered without delay, it seems service is not essential if it appears beyond doubt that the defendant is aware the injunction has been granted, and that the plaintiff intends to enforce it. (h)

(a) Ord. 50, r. 6.

(b) Ord. 66, r. 7 (j).

(c) Ord. 38, r. 19.

(d) 36 & 37 Vict. c. 66, s. 25, sub-s. 8; Ord. 50, r. 12.

(e) *Graham v. Campbell*, 7 Ch. Div. 490; 47 L. J. 593, Ch.; 38 L. T. Rep. N. S. 192; 26 W. R. 336;

*Secretary for War v. Chubb*, 43 L. T. Rep. N. S. 83; see also Ord. 52, r. 3.

(f) *Ayck. Pr.* 289, 9th ed.

(g) Ord. 50, r. 11.

(h) *United Telephone Co. v. Dale*, 50 L. T. Rep. N. S. 85; 32 W. R. 428.

The 21 & 22 Vict. c. 27, enacted that in all cases in which the Court of Chancery could grant an injunction against the breach of an agreement, or the commission or continuance of any wrongful act, or enforce the specific performance of an agreement, it might award damages to the party injured either in addition to or substitution for such injunction or specific performance. The Judicature Act, 1873, s. 24, sub-s. 7, however, provides that the High Court of Justice and the Court of Appeal, in every cause or matter, is to grant, either absolutely or conditionally, all such remedies whatsoever as any of the parties thereto may be entitled to in respect of every legal or equitable claim brought forward, so that as far as possible all matters in controversy between the parties may be completely and finally determined and multiplicity of legal proceedings avoided. Although this enactment did not impliedly repeal the 21 & 22 Vict. c. 27 (a), it was held that the latter Act did not give any new right to damages, it being enacted to prevent multiplicity of suits. (b) And now, by the 46 & 47 Vict. c. 49, it is repealed.

If the party restrained disobeys the order of the court he is in contempt, and the party obtaining it may move the court on notice to commit the disobedient party to prison. (c) Or, instead of or in addition to this, the proceedings provided by Order XLII., r. 30, stated *ante*, p. 165, may be taken.

An injunction may also be granted after judgment, in any cause or matter in which it has been or might have been claimed. (d)

A *mandamus* may be granted by an interlocutory order of the court, if it appears to be just or convenient that such

(a) *Krehl v. Burrell*, 7 Ch. Div. 551; 38 L. T. Rep. N. S. 407; 47 L. J. 353, Ch.

(b) *The Rock Portland Cement Company v. Wilson*, 48 L. T. Rep.

N. S. 386; 52 L. J. 214, Ch.; 31 W. R. 193.

(c) 1 Alph. Pr. 437; Ayk. Pr. 291, 9th ed.

(d) Ord. 50, r. 12.

order should be made, and either unconditionally, or upon such terms as may be just. (a)

Prior to this enactment there were (1) the prerogative writ of mandamus issued from the Court of Queen's Bench, directed to any person, corporation, or inferior Court of Judicature, requiring some particular act to be done; and (2) the mandamus given by the 17 & 18 Vict. c. 125, s. 68, for the performance of some duty in which the plaintiff was interested. But the duty must have been one of a public or *quasi* public nature. (b) This section is now repealed by the 46 & 47 Vict. c. 49.

Where the plaintiff claims a mandamus in an action to command the defendant to fulfil a duty in the fulfilment whereof the plaintiff is personally interested, he must indorse such claim upon the writ of summons. (c)

The Chancery Division of the High Court can only grant a mandamus directing the performance of some act which is the result of an action, where an action lies. It cannot grant a prerogative writ of mandamus. (d) The application for such writ must be made to the Queen's Bench Division. (e)

The plaintiff may apply for the order either *ex parte* or on notice; if the application be made by any other party to the action, it must be after his appearance and on notice to the plaintiff. (f)

No writ of mandamus can now be issued in an action, but a mandamus is to be by judgment or order, which is to have the same effect as a writ of mandamus formerly had. (g)

In case of disobedience the judgment or order may be enforced by attachment. (h) Or, instead of, or in addition to, proceeding against the disobedient party for contempt,

(a) 36 & 37 Vict. c. 66, s. 25, sub-s. 8.

(b) 3 Steph. Com. 615 *et seq.*, 8th ed.; Chitty's Forms, 427, 11th ed.

(c) Ord. 53, r. 1.

(d) *Glossop v. Heston Local*

*Board*, 12 Ch. Div. 102; 40 L. T. Rep. N. S. 736.

(e) Ord. 53, r. 5.

(f) Ord. 50, r. 6.

(g) Ord. 53, r. 4.

(h) 1 Alph. Pr. 534.

the proceedings provided by Order XLII., r. 30, stated *ante*, p. 165, may be taken.

A receiver may be appointed by an interlocutory order of the court in all cases where it is just or convenient, and either unconditionally or upon such terms as may be just. (a)

The ordinary cases for the appointment of a receiver are those in which the suit arises out of claims by parties having equitable interest in the subject matter, as in partnership transactions, between mortgagor and mortgagee, and the like. (b)

A receiver was appointed at the instance of a judgment creditor to obtain debts payable to the judgment debtor to which garnishee proceedings were not applicable. (c) So where there is a manifest breach of trust by an executor by wasting the property, a receiver may be appointed. (d)

Where the receiver is the substantial object of the action the writ of summons should be endorsed with a claim for a receiver. But a receiver may be appointed though not originally claimed by the writ. (e)

The motion may be made by any party to the action. By the plaintiff it may be made either *ex parte* or on notice; but if made by any other party it must be on notice to the plaintiff, and after the appearance of such party. (f)

The order will only be made *ex parte* in cases of emergency. Where bankruptcy and consequent loss to a trust estate were expected, a receiver was appointed before the writ of summons was issued. (g)

The evidence adduced in support of the application may be by affidavit. If the order is made without naming the

(a) 36 & 37 Vict. c. 66, s. 25, sub-s. 8.

(b) Story Eq. ss. 829, 830.

(c) *Westhead v. Riley*, 25 Ch. Div. 413; 32 W. R. 273.

(d) *In re Parker; Cash v. Parker*, 12 Ch. Div. 293; *Re Radcliffe*, 7 Ch. Div. 733.

(e) *Colebourne v. Colebourne*, 1 Ch. Div. 690; 43 L. J. 749, Ch.; 24 W. R. 235. *Norton v. Gover*, W. N. 1877, p. 206.

(f) Ord. 50, r. 6.

(g) *Re H.'s Estate*, 1 Ch. Div. 276; 45 L. J. 749, Ch.



receiver this must be done subsequently by summons at chambers. The affidavits must show the nature and value of the property, and that the receiver is a fit and proper person, and is willing to act. (a)

The receiver, as a rule, should have no interest in the property. Therefore a party to the action will not, as a rule, be appointed; nor the solicitor in the cause, except by consent; nor a peer; nor a trustee. (b)

Unless otherwise ordered, the person to be appointed receiver is first to give security to be allowed by the court or a judge, to be taken before a person authorised to administer oaths, duly to account for what he receives, and pay the same as the court or judge directs. Such security is to be by recognizance, unless the court or a judge otherwise directs. (c)

Security may be dispensed with, if all parties are *sui juris*, and consent thereto. (d)

The cause or matter pending may be adjourned to chambers, in order that the person named as receiver may give security. (e)

The recognizance is usually given with two sureties, but sometimes the security of the receiver alone is taken. The sureties must reside within the jurisdiction. When taken the recognizance is transmitted to the Central Office for enrolment. (f)

The court or a judge must fix the days upon which the receiver is to leave and pass his accounts, and pay in the balances appearing due thereon, or so much thereof as is certified as proper to be paid by him. And if the receiver neglects to leave and pass his accounts, and pay in the balances thereof at the times so fixed, the judge before whom the receiver is to account may, when his subsequent accounts are produced to be examined and passed, disallow the salary

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(a) 1 Alph. Pr. 748, 749.

(b) 1 Alph. Pr. 749, 750.

(c) Ord. 50, r. 16.

(d) 1 Alph. Pr. 750.

(e) Ord. 50, r. 17.

(f) 1 Alph. Pr. 750.

claimed by the receiver, and may also charge him with interest at 5*l.* per cent. per annum upon the balances so neglected to be paid by him. The accounts are left in the chambers of the judge to whom the cause or matter is assigned, verified by affidavit. (a)

After attornment the receiver may distrain, without order, for rent accruing within the year; if more be due an order is necessary. He may without order let for a year certain or less, and determine such tenancies by notice. He should not without leave raise rents, or evict tenants, or lay out large sums of money. The application for directions may be made by summons at chambers. (b)

The receiver is allowed a salary, or a commission on the rents or profits collected, for his trouble, unless otherwise ordered. (c) The amount depends on the ease or difficulty with which the collection is made, the maximum being usually 5*l.* per cent. (d)

The receiver may be discharged by the court (1) when he becomes unnecessary, (2) for neglecting to pass his accounts and pay in the balances, and (3) in case of bankruptcy. The order directs his discharge after he has passed his accounts, and his recognizances to be vacated, subject to the payment of any balance remaining in his hands. (e)

We have yet to consider the writ of *ne exeat regno*: It was originally a prerogative writ applicable only to the purposes of State. It had, however, of late become a part of the ordinary process of the Court of Chancery, and was considered as a species of equitable bail. (f)

It is granted in those cases in which the plaintiff is apprehensive that the defendant is about to leave the kingdom for the purpose of avoiding the plaintiff's demands. It can only be obtained when the plaintiff has an equitable money

(a) Ord. 50, rr. 18, 20.

(b) 1 Alph. Pr. 752.

(c) Ord. 50, r. 18.

(d) 1 Alph. Pr. 751.

(e) 1 Alph. Pr. 755; Ord. 50, r. 21.

(f) Ayck. Pr. 629, 7th ed.; Dan. Pr. 1648, 6th ed.

demand actually due, and certain in nature, except in the case of a claim for the amount due on a lost bond, or for a sum due on an admitted balance of an account. (a)

The claim must, since the operation of the Judicature Acts, be an equitable one, and of the amount and owing under the same circumstances, as a claim for which a debtor may be arrested on a *capias* under sect. 6 of the Debtors' Act, 1869. (b)

As a rule a writ of summons should be issued and the writ of *ne exeat* claimed by indorsement thereon, but it may be granted although not so claimed. In fact it may be granted in proceedings commenced by administration summons in chambers, or against a contributory in default in a winding-up case, without commencing an action. (c)

The application is by motion *ex parte*, supported by evidence by affidavit showing positively the nature of the debt and that the defendant intends going abroad; and that such absence will materially prejudice the plaintiff. The deponent's means of knowledge must also be shown. (d) Copies of the affidavits on which the application is granted must be furnished to the opposite party, upon receipt of a written request and undertaking to pay the proper charges. (e)

The order will generally only be made on the applicant's undertaking to abide by any direction as to damages, and to accept short notice of motion to discharge the writ. (f) The order must be drawn up passed and entered. (g)

The writ is next prepared and sealed. It must be indorsed with the name and address of the solicitor and agent, if any, or with the name and residence, or address for service, of the plaintiff, if he sues in person; also with the amount for which security is to be given. It is then delivered to the sheriff for

(a) Dan. Pr. 1648, 6th ed.

(b) *Drover v. Beyer*, 13 Ch. Div. 242; 41 L. T. Rep. N. S. 393; 49 L. J. 37, Ch.; 28 W. R. 89, 110.

(c) 1 Seton, Dec. 317, 4th ed.

(d) 1 Alph. Pr. 106; *Drover v. Beyer*, *sup.*

(e) Ord. 66, r. 7 (j).

(f) 1 Alph. Pr. 107.

(g) Ayok. Pr. 293, 9th ed.

execution. The sheriff may take a deposit of the amount indorsed instead of taking security. (a)

The writ may be discharged for irregularity, or on payment of the amount indorsed. The application is by motion on notice to the plaintiff. (b)

Another interlocutory application made by motion is for the preservation of property pending litigation concerning it.

Where by any contract a *prima facie* case of liability is established, and there is alleged, as a matter of defence, a right to be relieved wholly or partially from such liability, the court or a judge may make an order for the preservation or interim custody of the subject-matter of the litigation, or order that the amount in dispute be brought into court or otherwise secured. (c)

The plaintiff may apply for an order under this rule at any time after his right thereto appears from the pleadings, or, if there be no pleadings, as soon as it appears by affidavit or otherwise, to the satisfaction of the court or a judge. (d)

The court or a judge may, upon the application of any party to a cause or matter, and upon such terms as may be just, make an order for the detention, preservation, or inspection of any property or thing, the subject of the cause or matter, or as to which any question may arise therein, and for all or any of these purposes may authorise any person to enter upon or into any land or building in the possession of any party to the cause or matter, and to take any samples, or make any observation or experiment, which may be necessary or expedient for the purpose of obtaining full information or evidence. (e)

The principle underlying orders for the preservation of property pending litigation, is that the successful party shall reap the fruits of litigation, and not have merely barren victory. (f)

(a) 1 Alph. Pr. 107.

(b) 1 Alph. Pr. 107.

(c) Ord. 50, r. 1.

(d) Ord. 50, r. 7.

(e) Ord. 50, r. 3.

(f) *Polini v. Gray*, 12 Ch. Div. 438; 41 L. T. Rep. N. S. 173.

The order is frequently either for a receiver or an injunction. (a)

We have yet to speak of motions of course. Such a motion requires no notice to be given to the opposite party. It may be made on any day, whether a motion day or not, and is granted without the court being called upon to investigate the truth of any allegation or suggestion upon which it is founded, and is not mentioned in court. Counsel simply sign the brief and hand it to the registrar in court, who enters it in his book, marks the brief with his initials, and returns it to counsel. The brief is next taken to the order-of-course seat in the registrar's department at the Central Office, and the order is drawn up. It is then passed and entered without notice to the other side. (b)

## SECTION II.

### PETITIONS.

We have already seen, *ante*, p. 60, that if, from the nature of the application, a longer statement, in addition to the pleadings, is required, a written statement of the grounds of the application may be made by way of petition. And all applications for orders, which partake more of the nature of judgments than of interlocutory proceedings should be by petition. (c) Petitions like motions are divided into two kinds: (1) Special petitions; and (2) petitions of course.

Special petitions are always heard in court, and may also be divided into those which are presented in a cause or matter, and those which originate proceedings, and in the latter case the application would not be interlocutory, but it is convenient to state the practice here. Thus, a receiver may be appointed in an action by petition where an infant is interested; although in ordinary cases an application for the appointment of a receiver is made by motion. So

(a) 1 Alph. Pr. 730.

(b) 1 Alph. Pr. 546; Dan. Pr. 1547, 6th ed.

(c) Williams on Pet. 2.

an application for payment of money out of court may be made by petition; (a) also to obtain the sanction of the court to the marriage of a ward of court. (b) The cases where proceedings are originated by petition are usually taken under some statutory power, as under the Companies Act, 1862 (25 & 26 Vict. c. 89); under the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), and in lunacy, &c.

Subject to the power of transfer vested in the Lord Chancellor, every cause or matter commenced in the Chancery Division must be assigned to and marked with the name of one of the judges thereof, to whom, for the time being, chambers are attached, and where the commencement is by petition, this duty is performed in the office of the registrars, by one of the officers thereof. So a petition presented in a cause or matter already pending, must, if it relates to or is connected with the administration of the same trust, or the winding-up of the same company, whenever practicable be marked by the proper officer with name of the judge to whom the cause or matter has been assigned. (c)

In addition to being marked with the name of the judge, as above stated, the petition must, if made in a cause, be marked on the first page with the reference to the record and entitled in the cause. If presented under an Act of Parliament it must be entitled in the Act under which it is presented and in the matter in respect of which it is presented. (d)

The petition must state by whom it is presented, and if it is not presented in or by a party to an action, the residence and description of such person must be given. (e) A petition originating proceedings must be duly indorsed with an address for service, as in the case of a writ of summons, (f) as to which see *ante*, p. 37.

(a) 1 Alph. Pr. 657, 748.  
(b) Ayck. Pr. 592, 9th ed.  
(c) Ord. 5, r. 9 (a, d, e); and see *ante*, p. 18.

(d) 1 Alph. Pr. 672, 673; Will. Pet. 2.  
(e) 1 Alph. Pr. 673; Will. Pet. 3.  
(f) Ord. 4, r. 4.

It must contain only a statement in a summary form of the material facts relied on, but not the evidence to prove them, and must, when necessary, be divided into paragraphs, numbered consecutively. Dates, sums, and numbers being expressed in figures and not in words. Signature of counsel is not necessary, but if settled by counsel it must be signed by him, and if not so settled by him it must be signed by the solicitor, or by the party presenting it. (a)

At the foot of every petition (not being a petition of course) presented to the court, and of every copy thereof, it must be stated what persons, if any, it is intended to serve therewith, and if no person is intended to be served it must be so stated. (b) A petition need not be printed. (c)

Two copies of the petition must be left with the proper officer, one of which is for the use of the judge at the hearing, (d) and the other is filed at the Central Office. (e) All petitions which require to be answered are to be answered in the name of the senior registrar, for the time being (f), which he does by a marginal note signed by him, appointing the day for hearing, and the petition is entered for trial.

The petition is then served on the respondent, and unless the court gives special leave to the contrary, there must be, at least, two clear days between the service and the day appointed for hearing. But a petition presented under the 22 & 23 Vict. c. 35, s. 30, for the opinion and advice of a judge, must be served seven clear days before the hearing thereof, unless the person served consents to a shorter time. (g) A petition is served in the same manner as a notice of motion is served, as to which see *ante*, pp. 172, 173.

On the day appointed the parties will find the order of hearing of the petition from the registrar's printed list of petitions. Evidence on a petition is usually given by affidavit,

(a) Ord. 19, r. 4; 36 & 37 Vict. c. 66, s. 100; Will. Pet. 3.  
(b) Ord. 52, r. 16.  
(c) Ord. 19, r. 9.

(d) Ord. 36, r. 30.  
(e) Ord. 61, r. 31.  
(f) See Ord. 62, r. 18.  
(g) Ord. 52, rr. 17, 21.

but the court or a judge may, on the application of either party, order the attendance for cross-examination of any person who has made an affidavit. (a)

If on the petition being called on the petitioner does not appear, the petition will be dismissed with costs. If the respondent does not appear an order may be made against him. (b)

The order made on the hearing of a petition is drawn up, passed, and entered and enforced in the same manner as a judgment, as to which see *ante*, pp. 154, 159.

No order made on a petition can be passed until the original petition is filed in the Central Office. (c)

The costs on a petition are, as a general rule, in the discretion of the court. But where a petition is served and notice is given to the party served, that in case of his appearance in court his costs will be objected to, a tender of 1*l.* 10*s.* for costs of perusal is to be made. The court or a judge may allow such party his costs notwithstanding such notice or tender. (d)

As to petitions of course, the orders on such petitions are granted without any attendance. Most matters which may be moved for of course may be obtained on petition of course. (e)

Orders of course may be made by any judge of the Chancery Division, (f) but they were usually made on petitions presented to the Master of the Rolls. When the petition is drawn up and engrossed it is now taken to the office of the Chancery registrars, as it is provided that any orders on petitions which, according to the former practice, were drawn up, passed, and entered in the office of the secretaries of the Master of the Rolls, are to be drawn up, passed, and entered by or under the direction of the Chancery registrars. (g)

(a) Ord. 88, r. 1.

(b) 1 Alph. Fr. 675.

(c) Ord. 61, r. 15.

(d) Ord. 65, rr. 1, 27 (19).

(e) Will. Pet. 15, 308.

(f) Will. Pet. 15.

(g) Ord. 62, r. 18; see also Ord. 52, r. 14; *et ante*, p. 173.



## SECTION III.

## SUMMONS AT CHAMBERS.

A large number of interlocutory applications may be made to a judge while sitting in chambers, the most usual of which are for time to plead, for leave to amend pleadings, for discovery and production of documents, and generally all applications relating to the conduct of any cause or matter. Applications for payment or transfer to any person of any cash or securities standing to the credit of any cause or matter where there has been a judgment or order declaring the rights, or where the title depends only upon proof of identity, or the birth, marriage, or death of any person; or where the cash does not or the securities do not exceed 1000*l.*; or where the application is for the payment to any person of the dividend or interest on any securities standing to the credit of any cause or matter, whether to a separate account or otherwise. (a)

Applications at chambers are, with a few exceptions, heard in the first instance before the judge's chief clerks, and are made by summons, prepared by the solicitor, or by the party himself if he acts in person, entitled in the action, and must be addressed to all persons on whom it is to be served. It must be sealed, and a copy thereof left at chambers, and cannot be altered after it is sealed, except upon application at chambers. (b)

A summons issued for the purpose of obtaining some interlocutory order must be served two clear days before the return thereof unless otherwise ordered. (c)

The summons is served in the same manner as a notice, by being left within the prescribed hours (see *ante*, p. 63) at the address for service of the person to be served, and with

(a) See, further, Ord. 55, r. 2.

(b) Ord. 55, r. 15; Ord. 54, rr. 1, 3, 10; 1 Alph. Pr. 132.

(c) Ord. 54, r. 4. Where the

summons originates proceedings in chambers, it must be served seven clear days before the return thereof.

any person resident at or belonging to such place. (a) But it would appear that putting the summons in a letter box there is not good service within this order. (b)

Upon the return of the summons the parties attend at chambers, and, if any party fails to attend, the judge may proceed *ex parte* without any affidavit of non-attendance; but the judge may require evidence of service; which is usually by affidavit. Or if the judge does not think fit to proceed *ex parte*, he may order a reasonable sum for costs to be paid to the party attending by the absent party, or by his solicitor personally. (c)

Where an order has been made not embodying any special terms or directions, but simply enlarging time for taking any proceeding or doing any act, or giving leave for the amendment of any writ or pleadings, or for the filing of any document, &c., the order need not be drawn up unless the court or a judge otherwise directs; and a note or memorandum of such order, signed by the judge or chief clerk, is sufficient authority for such enlargement, &c., as fully detailed *ante*, p. 173. But the judge may direct any order made in chambers to be drawn up by the registrars, and such order is to be entered in the same manner as an order made in open court. (d)

Notes are to be kept of all proceedings in chambers with proper dates and in chronological order, with a short statement of the points decided at every hearing. (e)

Although most of the applications at chambers are heard before the chief clerk in the first instance, yet every party has a right to take the opinion of the judge in person upon his case, and for such purpose the matter is adjourned from the chief clerk to the judge. (f)

(a) See Ord. 67, r. 2, *et ante*, p. 173, and note (e).

(b) *Jiminez v. Owen*, W. N. 1883, p. 232.

(c) Ord. 54, rr. 5, 7.

(d) Ord. 52, r. 14; Ord. 55, r. 74.

(e) Ord. 55, r. 73.

(f) *Smith v. Watts*, 22 Ch. Div. 5; 48 L. T. Rep. N. S. 169; 52 L. J. 209, Ch.; 31 W. R. 262.

Amongst the applications for relief that may be made at chambers is that by way of *interpleader*.

Where the person seeking relief, called the applicant, is under liability for any debt, money, goods, or chattels for which he is, or expects to be, sued by two or more adverse claimants, he may take out a summons calling on the claimants to appear and state the nature and particulars of their claims, and either to maintain or relinquish them. (a)

The applicant must satisfy the court or judge by affidavit or otherwise (1) that he claims no interest in the subject-matter in dispute, other than for charges or costs; (2) that he does not collude with any of the claimants; and (3) that he is willing to pay or transfer the subject-matter into court, or to dispose of it as the court or judge directs. (b)

The applicant is not, however, to be disentitled to relief by reason only that the titles of the claimants have not a common origin, but are adverse to and independent of one another. (c)

Where the applicant is a defendant, application for relief may be made at any time after service of the writ of summons, and the court or judge may stay all further proceedings in such action (d); or if the claimants appear on the summons, the court or judge may order that any claimant be made a defendant in the action already commenced in respect of the subject-matter in dispute in lieu of or in addition to the applicant, or that an issue between the claimants be stated and tried, and in the latter case may direct which of the claimants is to be plaintiff and which defendant. (e)

The court or a judge may, with the consent of both claimants or on the request of any claimant, dispose of the merits of their claims, and decide the same in a summary manner, and on such terms as may be just, if, having regard to the value of the subject-matter in dispute, it seems desirable to do so. (f)

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(a) Ord. 57, rr. 1, 5.

(b) Ord. 57, r. 2.

(c) Ord. 57, r. 3.

(d) Ord. 57, rr. 4, 6.

(e) Ord. 57, r. 7.

(f) Ord. 57, r. 8.

When the question is one of law, and the facts are not in dispute, the court or judge may either decide the question without directing the trial of an issue, or order that a special case be stated for the opinion of the court. (a)

If a claimant makes default in appearing on the summons after being duly served therewith, or having appeared, neglects or refuses to comply with any order made after such appearance, the court or judge may make an order declaring him and all persons claiming under him, for ever barred against the applicant, and persons claiming under him; but the order is not to affect the rights of the claimants as between themselves. (b)

Except where otherwise provided by statute, the judgment in any action or in any issue ordered to be tried or stated in an interpleader proceeding, and the decision of the court or a judge in a summary way, is to be final and conclusive against the claimants, and all persons claiming under them, unless by special leave of the court or judge, or of the Court of Appeal. (c) An appeal by such leave lies direct to the Court of Appeal. (d)

When the applicant is a sheriff or other officer charged with the execution of process, in respect of goods or chattels seized in execution, and any claimant alleges that he is entitled, under a bill of sale or otherwise, to the goods or chattels by way of security for debt, the court or judge may order the sale of the whole or any part thereof, and direct the application of the proceeds of the sale in such manner and upon such terms as may be just. (e)

The court or judge may, in or for the purposes of any interpleader, make all such orders as to costs as may be just. (f)

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(a) Ord. 57, r. 9.  
(b) Ord. 57, r. 10.  
(c) Ord. 57, r. 11.

(d) *Burstall v. Bryant*, 49 L. T. Rep. N. S. 712; 32 W. R. 495.  
(e) Ord. 57, rr. 1, 12.  
(f) Ord. 57, r. 15.

## CHAPTER XVIII.

### APPEAL.

WE have already (*ante*, pp. 12, 13) described the constitution of the Courts of Appeal. We will in this chapter state the course to be taken by a party who considers himself aggrieved by the judgment or order of the court below.

### SECTION I.

#### TO THE COURT OF APPEAL.

The general right to appeal extends to all cases of judgments and orders, unless there is something in some act which took away the right of bringing error or appealing. (*a*)

The appellant may, by notice of motion, appeal from the whole or any part of a judgment or order; but the notice of motion must state whether the appeal is against the whole or part only of the judgment or order, and if only against part, such part must be specified. (*b*)

No order, however, made by the court or a judge by consent of parties, or as to costs only which by law are left to the discretion of the court, can be appealed against except by leave of the court or a judge making the order. (*c*) The costs of a trustee are not, it seems, in the discretion of the court, although he may be deprived of them by misconduct.

(*a*) *Per* Bramwell, L.J., in *Barton v. Titchmarsh*, 42 L. T. Rep. N. S. 610; 49 L. J. 573, Ex.; 28 W.

R. 821; 36 & 37 Vict. c. 66, s. 19.

(*b*) Ord. 58, r. 1.

(*c*) 36 & 37 Vict. c. 66, s. 49.

His costs are not, therefore, within 36 & 37 Vict. c. 66, s. 49, and an appeal may be brought from a decision in respect of them. (a)

Nor will the Court of Appeal, as a rule, interfere in a question which depends on the discretion of the court below. (b) And the Court of Appeal has no jurisdiction to decide a case in the first instance at the request of the judge below. (c)

Orders made in chambers may be discharged in court; but no appeal lies against any such order to discharge which no application has been made, except by special leave of the judge who made the order, or of the Court of Appeal. (d) And after hearing a case in chambers a judge may refuse leave to go straight to the Court of Appeal, and he may insist upon an argument before him in court, and give a formal judgment. (e)

All appeals to the Court of Appeal are now by way of rehearing, and brought by notice of motion in a summary way; no petition, case, or other formal proceeding being necessary. (f)

The notice of appeal from any judgment, interlocutory or final, or from a final order, must be a fourteen days' notice; and notice of appeal from an interlocutory order must be a four days' notice. (g)

The notice of appeal may be amended at any time, as to the Court of Appeal may seem fit. (h) Special circumstances need not be shown for the intervention of the Court of Appeal as to amendments. (i)

(a) *Turner v. Hancock*, 20 Ch. Div. 303; 51 L. J. 517, Ch.; 46 L. T. Rep. N. S. 517; 30 W. E. 480; *Re Knights Trusts*, 32 W. E. 417.

(b) *Golding v. Wharton Salt-works Company*, 1 Q. B. Div. 374.

(c) *Brown v. Collins*, 49 L. T. Rep. N. S. 329; *Flower v. Lloyd*, 6 Ch. Div. 297; 37 L. T. Rep. N. S. 419; 46 L. J. 838, Ch.; 25 W. E. 793.

(d) 36 & 37 Vict. c. 66, s. 50; and see *Re Elson*, 6 Ch. Div. 346.

(e) *Manchester Val de Travers Paving Company v. Slagg*, 47 L. T. Rep. N. S. 556.

(f) Ord. 58, r. 1.

(g) Ord. 58, r. 3.

(h) Ord. 58, r. 2.

(i) *Re Stockton Iron Company*, 10 Ch. Div. 335.

The notice of appeal must be served on all parties directly affected by the appeal, but not on parties not so affected. The Court of Appeal may, however, direct that notice of appeal be served on all or any parties to the action or proceeding, or upon any person not a party, and in the meantime may postpone or adjourn the hearing of the appeal upon such terms as may be just, and may give such judgment and make such order as might have been given or made if the persons served with such notice had been originally parties. (a) If a party who would be affected by the order of the Court of Appeal is not served, he may appear without service and obtain his costs. (b)

As to the time limited for appealing, no appeal to the Court of Appeal from an interlocutory order, or from any order, whether final or interlocutory, in any matter not being an action, can be brought after the expiration of twenty-one days, except by special leave of the Court of Appeal. No other appeal can, except by the same leave, be brought after the expiration of one year. These periods are calculated, in the case of an appeal from an order in chambers, from the time when such order was pronounced, or when the appellant first had notice thereof, and in all other cases from the time at which the judgment or order is signed, entered, or otherwise perfected, or in the case of the refusal of an application, from the date of such refusal. (c) The Court of Appeal has power to determine what judgments and orders are final and what interlocutory, if any doubt arises thereon. (d)

The party appealing must produce to the proper officer of the Court of Appeal the judgment or order appealed against, or an office copy of it, and must also leave with him a copy

(a) Ord. 58, r. 2.

(b) *Re New Callao*, 22 Ch. Div. 484; 52 L. J. 285, Ch.

(c) Ord. 58, r. 15; and see *Heatley v. Newton*, 19 Ch. Div. 326, C. A.; 45 L. T. Rep. N. S. 455; 51 L. J. 225, Ch.; 30 W. R. 72;

*Curtis v. Sheffield*, 46 L. T. Rep. N. S. 177; 21 Ch. Div. 1; 51 L. J. 535, Ch.; 30 W. R. 581; *Re Manchester Economic Building Society*, 21 Ch. Div. 488; 49 L. T. Rep. N. S. 793.

(d) 38 & 39 Vict. c. 77, s. 12.

of the notice of appeal to be filed, and the officer will then set down the appeal by entering it in the list of appeals. (a)

An appeal from the refusal of an interlocutory order may, however, be set down without production of the order appealed from, or a copy. (b)

If the appeal is not set down, the respondent cannot move to dismiss for want of prosecution, but is entitled to his costs of the abandoned appeal. (c)

If the respondent intends, upon the hearing of the appeal, to contend that the decision of the court below should be varied, he must give notice of such intention to parties who may be affected by such contention; but it is unnecessary for him, under any circumstances, to give notice of motion by way of cross appeal. (d) The above notice must, in the case of appeal from a final judgment, be an eight days' notice, and in the case of an appeal from an interlocutory order, a two days' notice. The omission to give the notice does not diminish the powers of the Court of Appeal; but it may, in the discretion of the court, be ground for an adjournment of the appeal, or for a special order as to costs. (e)

Two counsel will be heard on each side. (f)

When an *ex parte* application has been refused by the court below, an application for a similar purpose may be made to the Court of Appeal *ex parte* within four days from the date of such refusal, or within such enlarged time as a judge of the court below or of the Court of Appeal may allow. (g)

An application to a judge of the Court of Appeal is to be by motion made in the usual manner, (h) as to which see *ante*, p. 171.

(a) Ord. 58, r. 8.

(b) *Smith v. Grindley*, 3 Ch. Div. 80, C.A.; 35 L. T. Rep. N. S. 112; 24 W. R. 956.

(c) *Waddell v. Blockey*, 10 Ch. Div. 416; 40 L. T. Rep. N. S. 286.

(d) Ord. 58, r. 6.

(e) Ord. 58, rr. 6, 7.

(f) *Sneesby v. Lancashire & Yorkshire Railway Co.*, 1 Q. B. Div. 42.

(g) Ord. 58, r. 10.

(h) Ord. 58, r. 18.



The Court of Appeal may, under special circumstances, direct a deposit or other security for the costs of the appeal to be made or given. (a) An application for security for costs of an appeal must be made promptly. (b) Insolvency of the appellant is of itself a sufficient ground for ordering him to give security for costs of the appeal. (c)

The appeal does not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the court appealed from, or any judge thereof, or the Court of Appeal may order; and no intermediate act or proceeding is to be invalidated except so far as the court appealed from may direct. (d)

Where an application may, under these rules, be made either to the court below or to the Court of Appeal, or to a judge of the court below, or of the Court of Appeal, it must be made in the first instance to the court or judge below. (e)

When any question of fact is involved in an appeal the evidence taken thereon in the court below is, subject to any special order, to be brought before the Court of Appeal as follows: (1) Evidence taken by affidavit, by production of printed copies of such of the affidavits as have been printed, and office copies of such of them as have not been printed; (2) Evidence taken orally, by production of a copy of the judge's notes, or such other materials as the court may deem expedient. (f)

If, upon the hearing of an appeal, a question arises as to the ruling or direction of the judge to a jury or assessors, the court is to have regard to verified notes or other evidence, and to such other materials as the court deems expedient. (g)

If the evidence in the court below was not printed, the

(a) Ord. 58, r. 15.

(b) *Re Indian, &c., Mining Company*, 22 Ch. Div. 83, C. A.; 52 L. J. 31, Ch.; 48 L. T. Rep. N. S. 52; 31 W. R. 34.

(c) *Harlock v. Ashbury*, 19 Ch. Div. 84; 51 L. J. 96, Ch.; 45 L. T. Rep. N. S. 602; 30 W. R.

112; *Re Spencer; Spencer v. Hart*, 45 L. T. Rep. N. S. 396; but see *Usil v. Brearley*, 3 C. P. Div. 206; 38 L. T. Rep. N. S. 249.

(d) Ord. 58, r. 16.

(e) Ord. 58, r. 17.

(f) Ord. 58, r. 11.

(g) Ord. 58, r. 13.

court below or a judge thereof, or the Court of Appeal or a judge thereof, may order the whole or any part thereof to be printed for the purposes of the appeal, but if any party prints the evidence without such order he must bear the cost thereof, unless the Court of Appeal or a judge thereof otherwise orders. (a)

The Court of Appeal has the same powers and duties as to amendments and otherwise of the High Court together with full discretionary power to receive further evidence on questions of fact, either by oral examination in court, or by affidavit, or by deposition taken before an examiner or commissioner. (b)

Upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision appealed against, such further evidence may be given without special leave; but upon appeals from a judgment after trial or hearing upon the merits, such further evidence (save as to matters subsequent as above) can only be admitted on special grounds, and not without special leave of the court. (c)

The Court of Appeal has also power to draw inferences of fact and to give any judgment and make any order which ought to have been made, and to make such further order as the case may require. The above powers may be exercised although the notice of appeal asks that part only of the decision may be reversed or varied, and such powers may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have appealed from or complained of the decision. (d)

The Court of Appeal has no power, however, to make any order of or for the High Court, except by way of substituting by way of appeal a proper order for an order improperly made by that court. (e)

(a) Ord. 58, r. 12.

(b) Ord. 58, r. 4.

(c) Ord. 58, r. 4.

(d) Ord. 58, r. 4.

(e) *Flower v. Lloyd*, 6 Ch. Div.

297; 37 L. T. Rep. N. S. 419; 46 L. J. 833, Ch.; 25 W. R. 793; *Brown v. Collins*, 49 L. T. Rep. N. S. 329.

No interlocutory order not appealed from is to operate so as to bar or prejudice the Court of Appeal from giving such decision upon the appeal as may be just. (a)

On the hearing of an appeal, if it appears to the Court of Appeal that a new trial ought to be had, such court may order the verdict and judgment to be set aside and a new trial to be had. (b)

The Court of Appeal has power to make such order as to the whole or any part of the costs of the appeal as may seem just. (c) And interest for such time as execution has been delayed by the appeal is to be allowed, unless the court or a judge otherwise orders, to be computed by the taxing master without any order for that purpose. (d)

## SECTION II.

### TO THE HOUSE OF LORDS.

From a judgment or order of the Court of Appeal a further appeal lies to the House of Lords, subject as in the Appellate Jurisdiction Act of 1876 is mentioned. (e)

Every appeal to the House of Lords must be brought by way of petition of appeal with a schedule setting out the title of the parties to the cause, and the judgment or order appealed against, and must be lodged within one year from the date of the last order, or judgment appealed from. (f)

Before the petition is presented it must be printed, and notice thereof served, with a copy of the petition, on the agent of the party in the court below, who is to be made respondent in the appeal, and the fact of service is to be certified on the petition. Not less than two clear days' notice must be given. (g)

(a) Ord. 58, r. 14; *Sugden v. Lord St. Leonards*, 1 P. Div. 208-9.

(b) Ord. 58, r. 5.

(c) Ord. 58, r. 4.

(d) Ord. 58, r. 19.

(e) 39 & 40 Vict. c. 59, s. 3.

(f) 39 & 40 Vict. c. 59, s. 4; S. O. 1, 1876.

(g) Meth. Proceed. S. O. 1876; 1 Alph. Pr. 70.

The petition of appeal must be signed by two counsel who were the counsel in the court below, or who are to be engaged as counsel at the hearing in the House of Lords, and they must certify as to the reasonableness of the appeal. (a)

The petition is lodged in the Parliament Office, together with four printed copies thereof, and is presented by the Lord Chancellor through the Clerk of Parliaments. (b) On this petition an order is made for service on the respondent or his solicitor, ordering the respondent to lodge a case in answer to the appeal. A copy of this order is served on the respondent and the original shown to him. The original order is then returned to the Parliament Office, together with an affidavit of service within the time limited for the appellant to lodge his case, and in default the appeal is to stand dismissed, (c) and can only be reinstated by special application to the House of Lords. (d)

The appellant then prepares his case, consisting of an account of the proceedings and of the point to be raised on the appeal, and also an appendix containing copies of the documents used in evidence in the court below necessary for the appeal. This case and appendix must be printed and lodged in the Parliament Office within six weeks of the date of the presentation of the appeal. (e)

The appellant must give security to the Clerk of Parliaments by recognisance to the Queen in the penalty of 500*l.* as security to the respondent for his costs. (f)

The respondent enters an appearance at the Parliament Office, and the appellant should furnish him with a list of his documents and a proof copy of his appendix. The respondent is entitled to ten printed copies of the appendix. (g)

The respondent then prepares his case, and may print any additional documents used in evidence in the court below,

(a) S. O. 2, 1876.

(b) 1 Alph. Pr. 71.

(c) See S. O. 3, 1876, and Meth. *Proced.* 1876.

(d) *Mercier v. Williams*, 32 W. R. 152.

(e) S. O. 5, r. 1, 1876.

(f) S. O. 4, & Meth. *Proced.* 1876.

(g) Meth. *Proced.* S. O. 1876.

which are added to the appendix, and lodges his case with the Clerk of Parliaments within six weeks from the date of the presentation of the appeal, and delivers ten printed copies to the appellant. (a)

All printed cases must be signed by one counsel at least, who was either engaged in the court below or is to be engaged in the House of Lords. (b)

The parties may, by agreement, lodge a joint case. Copies of the cases and appendix thereto must be lodged in the Parliament Office for the use of their Lordships. (c) The printed cases may be amended on petition. (d)

As soon as all the printed cases and appendix have been lodged, it is optional for either party to set down the cause for hearing, but it is obligatory on the appellant to do so upon the lodgment of his printed case and appendix and expiration of the six weeks, and in default the appeal to stand dismissed. (e)

At the hearing the parties may appear either in person or by counsel, but only two counsel will be heard on each side. Two counsel open the case of the appellant, then two counsel are heard for the respondent. As a rule no evidence can be used which was not used in the court below, except under special circumstances. And as a general rule only those matters which are in the cases and appendix can be referred to. (f)

The Lords hearing the appeal state their reasons for advising the House to give judgment, and the question is put and the result announced by the Lord Chancellor. If the votes are equal the decision is affirmed. Applications for costs must be made after the Lords have stated their reasons, but before the House gives judgment. The Clerk of Parliaments draws up the judgment and sends copies to the agents

(a) S. O. 5, 1876; Meth. Proced. 1876.

(b) S. O. 5, r. 3, 1876.

(c) S. O. 5, r. 1, 1876; Meth. Proced. S. O. 1876.

(d) 1 Alph. Pr. 75.

(e) S. O. 5, r. 1, 1876; Meth. Proced. 1876.

(f) 1 Alph. Pr. 76; 1 Arch. Pr. by Prent. 504, 13th ed.

of the parties with a note of instructions. The draft is then returned to the judicial office, and if other than clerical errors are made reasons must be given, which will be considered by the Clerk of the Parliaments and determined by him, or referred to one of their Lordships. Ultimately a fair copy, signed by the Clerk of Parliaments, is issued to the successful party. The judgment is recorded in the journals of the House. Printed copies thereof are supplied to the parties requiring them. (a)

When the decision below is simply affirmed the judgment of the House need not be made an order of the court below; but if it is varied or reversed it must be made an order of the court below. The application should be made to the court below and not to the Court of Appeal. (b)

The House of Lords possesses power to deal with the costs of the appeal, and also with the costs below. (c)

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(a) 1 Alph. Pr. 77, 78.  
(b) 1 Alph. Pr. 78; 1 Arch. Pr.  
by Prent. 505, 13th ed.

(c) 1 Alph. Pr. 78.

## CHAPTER XIX.

### PROCEEDINGS IN DISTRICT REGISTRIES.

DISTRICT registries were instituted by the Judicature Acts, in different places in the country, to which district registrars and other officers are attached; and every district registrar is an officer of, and subject to the jurisdiction of, the Supreme Court, and of the divisions thereof. (a)

In these district registries, as shown *ante*, p. 17, actions may be commenced, and where an action proceeds in a district registry the district registrar has the same authority and jurisdiction in respect thereof as a judge at chambers, with the exception of such matters as a master is precluded from exercising; (b) which are matters relating to the liberty of the subject; the transfer of actions from one division or judge to another; the settlement of issues except by consent; inspection and other orders under Order L., rr. 1 to 5; appeals from district registrars; prohibitions; injunctions and other orders under sect. 25, sub-sect. 8, of the Judicature Act, 1873; (c) awarding costs, other than costs of proceedings before a master or registrar, or costs he is authorised to award; reviewing the taxation of costs; charging orders absolute; acknowledgments of married women; granting leave for service out of the jurisdiction of a writ of summons, or of notice of the writ. (d)

In any action, other than a probate action, the plaintiff,

(a) 36 & 37 Vict. c. 66, s. 60;  
38 & 39 Vict. c. 77, s. 13; Ord.  
Counc. Aug. 1875; Ord. 35, r. 11.

(b) Ord. 35, r. 6.  
(c) See *ante*, pp. 174-183.  
(d) Ord. 54, r. 12.

wherever resident, may issue a writ of summons out of any district registry. (a)

If the defendant resides or carries on business within the district he must enter an appearance there; but if he neither resides nor carries on business within the district he may enter an appearance either in the district registry or at the Central Office. (b)

If a sole defendant appears, or if all the defendants appear in the district registry, or if all the defendants who appear do so in the district registry, and others make default in appearance, the action will proceed there unless removed (in the manner shown *post*, pp. 208, 209); but if any defendant appears in London the action is to proceed in London, unless the court or a judge orders the action to proceed in the district registry on the ground that the defendant appearing in London is merely a formal defendant, or has no substantial cause to interfere in the conduct of the action. (c)

When a cause or matter is proceeding in a district registry, all proceedings, except where, by the Rules of Court, it is otherwise provided, or the court or a judge otherwise orders, are to be taken in the district registry, down to and including the entry of final judgment; and every final judgment, and every order for an account by reason of the default of the defendant, or by consent, must be entered in the district registry. (d)

So where the writ of summons issues out of, or a cause or matter is proceeding in a district registry, and the plaintiff is entitled to enter interlocutory judgment either for default of appearance of (see Order XIII.), or for default of pleading (see Order XXVII.) by, the defendant, such interlocutory judgment, and when damages have been assessed, final judgment is to be entered in the district registry, unless the court or a judge otherwise orders. (e) And when a cause or

(a) Ord. 5, r. 1.

(b) Ord. 12, rr. 4, 5.

(c) Ord. 12, rr. 6, 7.

(d) 36 & 37 Vict. c. 61, s. 64;  
Ord. 35, r. 1.

(e) Ord. 35, r. 2.



matter is proceeding in a district registry all pleadings and other documents required to be filed must be filed in the district registry; but all certificates of the Chancery chief clerk and taxing officers, and such other documents (as require filing) used in London before the judge in chambers, or before a taxing officer or referee, and not already filed in the district registry, must be filed in the same office as they would have been filed in if the proceedings had been commenced in London. If the court or judge so directs office copies thereof are to be transmitted to the district registry. (a)

The action, though commenced in the district registry, will be tried in London before the judge of the Chancery Division to whom it is assigned. (b)

And it was held on the construction of the Rules of Court of 1875, that district registrars have no power to appoint receivers or direct banking accounts to be opened, and money to be paid in to those accounts. (c) Nor order accounts to be taken. (d) Nor to take accounts directed by the judge in actions commenced in the district registry, unless the judgment expressly directs him to do so. (e)

Applications to a district registrar are made by summons. (f)

The district registrar has power to refer to the judge, to whose court the cause or matter is assigned, any matter which appears to be proper for the decision of such judge, who may either dispose of the matter, or refer it back to the registrar with such directions as he may think fit. (g)

When an action proceeds in a district registry all writs of execution issue from the district registry, unless otherwise ordered by the court or a judge. And the following proceed-

(a) Ord. 35, rr. 19, 21.

(b) *Re Smith; Hutchinson v. Ward*, 6 Ch. Div. 692; 36 L. T. Rep. N. S. 178; 25 W. R. 452.

(c) *Re Smith, sup.*

(d) *Irlam v. Irlam*, 2 Ch. Div. 608; 24 W. R. 292.

(e) See *Re Smith, sup.*; *Brassington v. Cussons*, 24 W. R. 881; but see *Re Bowen; Bennett v. Bowen*, 20 Ch. Div. 538; 46 L. T. Rep. N. S. 114.

(f) Ord. 35, r. 7; Ord. 54, r. 1.

(g) Ord. 35, rr. 8, 12.

ings must, unless otherwise ordered, be taken there: Leave to enter judgments under Order XVI., rr. 50, 51 (as to third party making default in appearance); leave to issue or renew writs of execution; examination of judgment debtors for garnishee purposes, or for discovery in aid of execution; garnishee orders; charging orders *nisi*. (a)

An appeal from any order or decision of a district registrar lies to the judge to whom the cause or matter is assigned, even though it be in respect of a matter as to which the district registrar had jurisdiction only by consent. Such appeal is either by way of indorsement on the summons by the registrar, or by notice in writing to attend before the judge within six days after the party complaining has notice of the order or decision complained of, unless this time be extended by the judge or registrar. The appeal is not, however, a stay of proceedings unless ordered by the judge or the registrar. (b)

Where final judgment is entered in the district registry costs must be taxed in such registry unless the court or a judge otherwise orders. (c)

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(a) Ord. 35, rr. 4, 5.  
(b) Ord. 35, rr. 9, 10, 12.

(c) Ord. 35, r. 4.

## CHAPTER XX.

## TRANSFER OF ACTIONS.

It sometimes becomes necessary to transfer an action from one division of the High Court to another division of that court, or to transfer a cause or matter from one judge of the Chancery Division to another, or such transfer may be from or to a district registry, or from or to a County Court.

## 1. FROM ONE DIVISION TO ANOTHER.

If any plaintiff or petitioner at any time assigns his cause or matter to any division of the High Court to which the same ought not to be assigned, the court, or any judge of such division, may, on a summary application at any stage of the cause or matter, direct the same to be transferred to the division of the said court to which it ought to have been assigned, or may order it to be retained in the division in which it was commenced. But all steps and proceedings taken by any party in such cause or matter, and all orders made therein before any such transfer, are valid and effectual to all intents and purposes, as if they had been taken and made in the proper division of the court. (a)

Thus, if an action is commenced in the Queen's Bench Division, which should properly have been brought in the Chancery Division (see *ante*, p. 11), such action will be transferred to the latter division on application made. (b)

(a) 36 & 37 Vict. c. 66, s. 36;  
38 & 39 Vict. c. 77, s. 11, sub-sect.  
2.

(b) See *Holloway v. York*, 2 Ex.

Div. 333; 25 W. R. 403; but see  
*Newbould v. Steade*, 49 L. T. Rep.  
N. S. 649, C. A.

A summary application is made by summons. (a)

Where an action commenced in the Chancery Division is to be tried by a jury and a judge of another division the action ought to be transferred to the latter division. (b)

The Rules of Court made on the Judicature Acts provide that the Lord Chancellor may order a cause or matter to be transferred from one division to another, but no transfer can be made from or to any division without the consent of the president of the division. Also that any cause or matter may, at any stage, be transferred from one division to another by an order made by the court or any judge of the division to which the cause or matter is assigned; but no such transfer can be made without the consent of the president of the division to which the cause or matter is proposed to be transferred. (c)

A particular application in any cause or matter may, by the direction of the Lord Chancellor, be heard and disposed of by any judge of the High Court who consents to do so, to whatever division or judge such cause or matter may have been assigned. (d)

A cause or matter transferred from any other division to the Chancery Division, must, by the order directing the transfer, be assigned to one of the judges of that division to be named in the order. (e)

## 2. FROM ONE JUDGE OF THE CHANCERY DIVISION TO ANOTHER.

A cause or matter may be transferred from one judge to another of the Chancery Division by order of the Lord Chancellor. In this division the transfer may, by the order for transfer or a separate order, be made for the purpose only of hearing or of trial, and in such case the

(a) *Blewitt v. Dowling*, W. N. 1875, p. 202.

(b) *Clements v. Norris*, W. N. 1878, p. 4; *Jones v. Baxter*, 5 Ex. Div. 275; 28 W. R. 817.

(c) Ord. 49, rr. 1, 3.

(d) Ord. 49, r. 4.

(e) Ord. 49, r. 7. As to transfer on bankruptcy, see 46 & 47 Vict. c. 52, s. 102 (4).

original and any further hearing takes place before the judge to whom the action is transferred; but all other proceedings therein, whether before or after the hearing or trial, are to be taken and prosecuted in the same manner as if such cause or matter had not been transferred, unless the judge to whom the cause or matter is transferred directs that any further proceedings shall be taken before himself, or before an official or special referee. (a)

Where an order has been made by any judge of the Chancery Division for winding-up a company, or for the administration of the assets of any testator or intestate, such judge has power, without any further consent, to order the transfer to himself of any cause or matter pending in any other court or division brought or continued by or against such company, or by or against the executors or administrators of the testator or intestate whose assets are being so administered. (b)

It would appear that the Court of Appeal has no power to order a transfer from one judge of the Chancery Division to another, even with the consent of both parties. (c)

### 3. FROM AND TO DISTRICT REGISTRIES.

Where an action is brought in a district registry, any defendant may remove such action to London as of right in the cases and times following:

(1) Where the writ is specially indorsed with a claim for a liquidated demand, &c., under Order III., rule 6, and the plaintiff has not, within four days after appearance thereto, given notice of an application to sign final judgment under Order XIV. (see *ante*, p. 53), and the defendant has not delivered a defence, and the time for doing so has not expired.

(2) When the writ is specially indorsed, and the plaintiff

(a) Ord. 49, rr. 1, 2.

(b) Ord. 49, s. 5; and see *Chapman v. Mason*, 40 L. T. Rep. N. S. 678.

(c) *Re Hutley*, 1 Ch. Div. 11; 45 L. J. 79, Ch.; 33 L. T. Rep. N. S. 337; *Re Boyd's Trusts*, 1 Ch. Div. 12.

has applied for an order to sign final judgment, and the defendant has obtained leave to defend, under Order XIV., and has not delivered a defence, and the time for doing so has not expired;

(3) Where the writ is not specially indorsed, and the defendant has appeared but has not delivered a defence, and the time for doing so has not expired. (a)

In the foregoing case the removal is effected by serving upon the other parties to the action, and also on the district registrar, a notice, signed by the defendant or his solicitor, stating that it is desired to remove the action to London. But the court or a judge, if satisfied that such defendant is only a formal defendant, or has no substantial cause to interfere in the conduct of the action, or for other good cause, may order that the action proceed in the district registry, notwithstanding such notice. (b)

The notice for removal must be accompanied by a certificate signed by the defendant or his solicitor stating that the defence has not been delivered, and that the time for delivering it has not expired. (c)

In cases not provided for as above, the court, or a judge, or the district registrar may, at any time, on application made by any party to a cause or matter proceeding in a district registry, order its removal from the district registry to London if satisfied that there is sufficient reason for so doing, and may impose such terms as may be just. (d)

Where a cause or matter is removed from a district registry to London, the district registrar is to transmit to the central office, all original documents, if any, filed in the district registry, and a copy of all entries of the proceedings in the books of the district registry. (e) And the defendant must give notice to the plaintiff of an address for service in London, in all respects as if the appearance had been

(a) Ord. 35, r. 13.

(b) Ord. 35, r. 14.

(c) Ord. 35, r. 15.

(d) Ord. 35, r. 16.

(e) Ord. 35, r. 20.

originally entered in London. The action then proceeds as if it had been commenced in London. (a)

On the other hand, any party to any cause or matter proceeding in London may apply to the court or a judge for an order to remove the same from London to a district registry, which may be ordered accordingly, if there be sufficient reason for so doing, and upon such terms, if any, as may be just. (b)

#### 4. FROM AND TO COUNTY COURTS.

In equity cases a judge of the Chancery Division, on an application at chambers by any party to the action or matter pending in the County Court, may transfer the same to the Chancery Division upon such terms, if any, as to security for costs or otherwise as such judge may think fit. (c)

When a transfer is ordered the registrar is to make and certify under his hand office copies of all entries of record in the books of the court, and transmit them, together with all such documents as are filed in the action, to the proper officer of the High Court. (d)

Where any equitable remedy or relief is claimed, if it appears that the subject matter of the action exceeds the amount to which the jurisdiction of the County Court is limited, the judge of the County Court may make an order for the transfer of the action to the Chancery Division of the High Court. The registrar is to make and file a copy of such order and transmit the order to the proper officer of the Chancery Division of the High Court, and send notice thereof to all parties entitled to be served with a copy of such order. (e)

And where in an action in the County Court the defence

(a) 36 & 37 Vict. c. 66, s. 65;  
Ord. 35, r. 18.

(b) Ord. 35, r. 17.

(c) 28 & 29 Vict. c. 99, s. 3.

(d) County Court Rules, 1875,  
O. 20, r. 7.

(e) 28 & 29 Vict. c. 99, s. 9;  
County Court Rules, 1875, O. 20,  
r. 5.

or counterclaim involves matters beyond the jurisdiction of that court, the High Court or any judge thereof may, on the application of any party, order the transfer of the proceeding into the High Court, or any division thereof. The record of such proceeding is to be transmitted to the proper officer of the High Court. (a)

On the other hand, when an action or proceeding is pending in the Chancery Division which ought to have been commenced in the County Court, any party thereto may apply by summons at chambers to have the same transferred to the County Court, and the judge to whose court such action is assigned may, on such application, or without if he thinks fit, order such transfer to be made. (b)

If a cause be removed from an inferior court having jurisdiction in the cause, the costs in the court below are to be costs in the cause. (c)

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(a) 36 & 37 Vict. c. 66, ss. 89,  
90; County Court Rules, 1875,  
O. 20, r. 7.

(b) 30 & 31 Vict. c. 142, s. 8.  
(c) Ord. 65, r. 3.



## CHAPTER XXI.

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### CHANGE OF PARTIES BY DEATH, MARRIAGE, &c.

FORMERLY where an event happened which wholly deprived some party to a suit of an interest in the subject matter of such suit, as the marriage of a female plaintiff, or if a party had died whose interest survived to his representatives, the suit was said to have *abated* or *broken down*, and required to be *revived*. (a)

Now, however, no cause or matter is to become abated by reason of the marriage, death, or bankruptcy of any of the parties, if the cause of action survive or continue; and does not become defective by the assignment, creation, or devolution of any estate or title *pendente lite*; and, whether the cause of action survives or not, there is to be no abatement by reason of the death of either party between the verdict or finding of the issues of fact and the judgment, but judgment may in such case be entered, notwithstanding the death. (b)

Where a plaintiff, after action brought, became bankrupt, notice of motion by the defendant to dismiss the action for want of prosecution was, however, ordered to be served on the trustees in bankruptcy. (c)

In case of the marriage, death, or bankruptcy or devolution of estate by operation of law of any party to a cause or matter,

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(a) Rede, Pl. 68.

(b) Ord. 17, r. 1.

(c) *Wright v. Swindon, &c.*,

*Railway Company*, 4 Ch. Div. 164;  
36 L. T. Rep. N. S. 590; 46 L. J.  
199, Ch.

the court or a judge may, if necessary for the complete settlement of all the questions involved, order that the husband, personal representative, trustee, or other successor in interest, if any, of such party, be made a party, or be served with notice, on such terms as are just, and make such order for the disposal of the cause or matter as may be just. (a)

In case of an assignment, creation, or devolution of any estate or title *pendente lite*, the cause or matter may be continued by or against the person to or upon whom such estate or title has come or devolved. (b)

And where, by reason of the marriage, death, bankruptcy, or other event, occurring after the commencement of a cause or matter, and causing a change or transmission of interest, or liability, or by reason of any person interested coming into existence after the commencement of the cause or matter, it becomes necessary or desirable that any person not already a party to the action should be made a party, or that any person already a party should be made a party in another capacity, an order may be obtained *ex parte*, on an allegation of the facts, that the proceedings in the action be carried on between the continuing parties and such new party or parties. (c)

Where, in consequence of the death of a plaintiff or defendant, a fresh interest had arisen in another person not a party to the suit, and when there was no privity between the party who had died and the person not a party who so succeeded, it was decided that an order of course to revive under the former practice, could not be obtained on the ground that the suit was thereby "defective by reason of some change or transmission of interest or liability." (d)

The marriage of a female defendant did not formerly abate the suit, it being only necessary to name the husband

(a) Ord. 17, r. 2.

(b) Ord. 17, r. 3.

(c) Ord. 17, r. 4; and see hereon *Andrew v. Aitken*, 21 Ch. Div. 175.

(d) *Hills v. Springett*, L. Rep. 5 Eq. 123; see also *Chapman v. Day*, 49 L. T. Rep. N. S. 436, C. A.

as well as the wife in the subsequent proceedings. (a) And now married women sue and defend as provided by the 45 & 46 Vict. c. 75 (Married Women's Property Act, 1882) (b), as to which see *ante*, pp. 23, 29.

Where the personal representatives of a deceased party elect to go on with the action they are personally liable for costs. (c)

When an order is necessary under the above stated rules it is obtained on motion or petition of course, without being mentioned to the court. (d)

But it is in the discretion of the court whether it will allow an action which has become defective by the death of a party to be revived. (e)

The order must, unless otherwise directed, be served on the continuing parties or their solicitors, and on the new party unless the person obtaining the order is the only new party, and it will be binding from the time of service (subject to discharge, as stated *infra*), and any person served who is not already a party to the cause or matter must enter an appearance thereto within the same time and in the same manner as if served with a writ of summons. (f)

Where any person under no disability, or under no disability other than coverture, or being under any disability other than coverture, but having a guardian *ad litem*, is served with such order, he may apply to the court or a judge within twelve days after service, to discharge or vary such order. If the person served is under any disability other than coverture, and has no guardian *ad litem*, he has twelve days from the time of the appointment of a guardian *ad litem* for him to apply to discharge or vary the order. (g)

(a) 1 Alph. Pr. 596; Ayok. Pr. 293.

(b) Ord. 16, r. 16.

(c) *Boynton v. Boynton*, 4 App. Cas. 733; 41 L. T. Rep. N. S. 450; 27 W. R. 141, 825.

(d) *Roffey v. Miller*, W. N. 1875,

p. 225; 24 W. R. 109; *Darcey v. Whittaker*, W. N. 1876, p. 17.

(e) *Curtis v. Sheffield*, 20 Ch. Div. 398, C. A.; 51 L. J. 535, Ch.; 46 L. T. Rep. N. S. 177; 30 W. R. 581.

(f) Ord. 17, r. 5.

(g) Ord. 17, rr. 6, 7.

A person served with notice of an administration judgment (see *ante*, p. 21), and having obtained liberty to attend the proceedings under it, is in the same position as a party to the action, and is entitled to obtain an order of course to revive the action on the death of a sole plaintiff (a)

When the plaintiff or defendant in a cause or matter dies, and the cause of action survives, and the person entitled to proceed fails to do so, the defendant, or person against whom the cause or matter may be continued, may apply by summons to compel the plaintiff or person entitled to proceed, to proceed within a time to be ordered, and in default thereof judgment may be entered for the defendant, or as the case may be, for the person against whom the cause or matter might have been continued; and in such case, if the plaintiff has died, execution may issue as provided by Order XLII., rule 23 (b), as to which see *ante*, p. 160.

Where a cause or matter becomes abated, or a change of interest occurs, the solicitor for the plaintiff or person having the carriage of the proceedings, must certify the fact to the proper officer, who will make an entry thereof in the cause-book. And when a cause or matter has stood for one year in the cause-book as "abated," or standing over generally, it will, at the expiration of such time, be struck out of the causebook. (c)

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(a) *Burstall v. Fearon*, 24 Ch. Div. 126; 53 L. J. 144, Ch.; 31 W. R. 581.

(b) Ord. 17, r. 8.  
(c) Ord. 17, rr. 9, 10.

## CHAPTER XXII.

### PROCEEDINGS IN CHAMBERS.

THE business in chambers of the judges of the Chancery Division, to whom chambers are attached, (*a*) is to be carried on in conjunction with their court business (*b*); and the business in chambers may be divided into two kinds: (1) the making of orders in cases of an ordinary character, or where the property is of small amount; and (2) business which is little more than ministerial, such as the taking of accounts and making inquiries directed by a judgment.

### ORIGINATING SUMMONS.

We have already shown (*ante*, pp. 188, 191,) the cases in which interlocutory orders may be obtained at chambers. Proceedings may also be originated in chambers by summons, as for the determination of matters relating to the administration of the estate of a deceased person; or under the Vendor and Purchaser Act (37 & 38 Vict. c. 78) s. 9, for the opinion of a judge on requisitions on a title; applications under the 18 & 19 Vict. c. 43, for the settlement of any property of any infant on marriage; applications as to the guardianship and maintenance or advancement of infants; &c. (*c*)

As proceedings originating in chambers for administration purposes are important and usual, we propose to treat of

(*a*) Chambers are not attached to all the equity judges, and the chamber business of the one to whom chambers are not attached is transacted in the chambers of

one of the other judges having chambers so attached.

(*b*) Ord. 55, r. 1.

(*c*) See Ord. 55.

them fully: it is ordered that the executors or administrators of a deceased person, or the trustees under a deed or instrument, or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, next of kin, or heir of a deceased person, or as *cestui que trust* under any instrument, or as claiming under such creditor or person as above, may take out, as of course, an originating summons, returnable in chambers, seeking the determination, without an administration of the estate or trust, of (1) any question affecting the rights or interests of such creditor, devisee, &c., as above named; or (2) the ascertainment of any class of creditors, legatees, devisees, next of kin, or others; and (3) the furnishing or vouching any particular accounts by executors, administrators, or trustees, or (4) the payment into court of moneys in their hands, or (5) the doing or abstaining from doing of other acts by them in their representative character; (6) the approval of any sale, purchase, compromise, or other transaction; or (7) the determination of any question arising in the administration of the trust or estate. And the persons above named may, in like manner, obtain an order for the administration of the real or personal estate of the deceased, or of the trust.

Where the summons is taken out by an executor, administrator, or trustee, for the determination of any question under numbers 1, 5, 6, 7, it must be served upon all or one of the persons whose rights or interests are sought to be affected; or, if under number 2, upon a member of the class; or, if under number 3 or 4, upon any persons interested in the accounts, or money. And where administration of personal estate is sought, the summons must be served upon the residuary legatees, or next of kin, or some of them; and where administration of real estate is sought, it must be served upon the residuary devisees, or heirs, or some of them; and where administration of a trust is sought, upon the *cestuis que trust*, or some of them. And if all the executors or administrators or trustees do not concur in taking

out the summons, it must be served upon those who do not concur. If the summons is taken out by any person other than the executors, administrators, or trustees, it must be served on such executors, administrators, or trustees. (a)

When a proceeding is commenced by originating summons, such summons must be taken out in the writ department at the Central Office, and the officer issuing it must mark it with the name of one of the judges to whom for the time being chambers are attached. (b) And when any summons has been taken out for administration purposes, as above detailed, every subsequent summons relating to the same estate or trust, must be marked with the name of the judge to whom the matter is thus assigned; and in case any such subsequent summons is marked with the name of another judge, the executors, administrators, or trustees must apply for its transfer to such first-named judge. (c)

Upon such summons the court or judge may pronounce such judgment as the case requires, and may give any special directions touching the carriage or execution of the judgment, or service thereof upon persons not parties. It is not obligatory, however, on the court or judge to pronounce judgment or make an order for the administration of the trust or estate, if the questions between the parties can be properly determined without such judgment or order. (d)

The issue of a summons for the determination, without administration, of the questions stated *ante*, p. 217, and numbered 1 to 7, is not to interfere with or control any power or discretion vested in any executor, administrator, or trustee, except so far as such interference or control may necessarily be involved in the particular relief sought. (e)

An originating summons (for whatever purpose) is to be

(a) See Ord. 55, rr. 3, 4, 5.

(b) Ord. 5, r. 9 (a, b).

(c) Ord. 55, r. 11.

(d) Ord. 55, rr. 8, 9, 10; and see

*Re Llewellyn; Lane v. Lane*, 25 Ch. Div. 66; 49 L. T. Rep. N. S. 399.

(e) Ord. 55, r. 12.

prepared by the applicant or his solicitor, and must be sealed in the Central Office and marked as aforesaid, and is then deemed to be issued. A copy of the summons must be left at the Central Office, and filed there, and stamped, (a) An originating summons, when service is necessary, must be served seven clear days before the return thereof. (b) As to the mode of service, see *ante*, p. 188.

The day and hour for attendance under an originating summons are added after the sealing at the Central Office, by the chief clerk of the judge to whom the matter is assigned at chambers, to whom the summons must be taken for that purpose, and he also seals the summons with the seal used at chambers. (c)

The summons must be duly indorsed with an address for service, as in the case of a writ of summons (d), as to which, see *ante*, p. 37.

The parties served with an originating summons, must, before they are heard in chambers, enter appearances at the Central Office, and give notice thereof. (e)

If a party attends the hearing or a summons at chambers by counsel he does so at his own risk as to the costs; it being ordered that no costs of counsel attending at judges' chambers shall in any case be allowed, unless the judge certifies it to be a proper case for counsel to attend. (f) This rule applies on taxation of costs between solicitor and client, as well as between party and party. (g)

### SUMMONS TO PROCEED.

We have before stated that a judgment in the Chancery Division is frequently an interlocutory one, directing accounts

(a) Ord. 5, r. 9 (b); Ord. 55, r. 20.  
(b) Ord. 54, r. 4; see also Ord. 55, r. 22.  
(c) Ord. 55, r. 21.  
(d) Ord. 4, r. 4.

(e) Ord. 55, r. 23.  
(f) Ord. 65, r. 16.  
(g) *Re Chapman*, 10 Q. B. Div. 54, C. A.; 52 L. J. 76, Q. B.; 47 L. T. Rep. N. S. 426; 31 W. R. 266.



to be taken or inquiries to be made, which are usually carried out in the chambers of the judge pronouncing the judgment, by his chief clerk; and when these accounts have been taken, or the inquiries made, the result is made known to the judge in the form of a certificate, and the cause comes on again before him for further consideration.

The court or judge may, at any stage of the proceedings in a cause or matter, direct any necessary inquiries or accounts to be made or taken, notwithstanding it may appear that there is some special or further relief sought for or some special issue to be tried, as to which it may be proper that the cause or matter should proceed in the ordinary manner. (a)

Every judgment or order for a general account of the personal estate of a testator or intestate must contain a direction for an inquiry, what parts, if any, of such personal estate are outstanding or undisposed of, unless the court or a judge otherwise directs. (b)

Where a judgment or order directs accounts to be taken or inquiries to be made, each direction is to be numbered, so that, as far as may be, each distinct account and inquiry may be designated by a number. (c)

Where a writ of summons has been indorsed with a claim for an account (see *ante*, p. 36), or where the indorsement thereon involves taking an account, then if the defendant either fails to appear, or, after appearance, fails to satisfy the court or judge, by affidavit or otherwise, that there is some preliminary question to be tried, an order for the proper accounts, with all necessary inquiries and directions is to be forthwith made. The application is to be made by summons, at any time after the time for entering an appearance has expired, and to be supported by affidavit, when necessary, filed on behalf of the plaintiff, stating concisely the grounds of his claim to an account. (d)

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(a) Ord. 33, r. 2.

(b) Ord. 33, r. 6.

(c) Ord. 33, r. 7.

(d) Ord. 15, rr. 1, 2.

The party entitled to prosecute a judgment or order directing accounts to be taken or inquiries to be made, must, within ten days after it is passed and entered, bring a copy thereof, certified to be a true copy, into the chambers of the judge to whose court the cause is attached. If he makes default in doing this any other party to the cause or matter may bring in such copy, and will then become entitled to the conduct of the proceedings, unless otherwise ordered. (a) A note stating the names of the solicitors for all parties, and showing for which of the parties such solicitors are concerned, must be left at chambers with every judgment or order. (b)

Every chief clerk has, for the purpose of proceedings directed to be taken before him power to issue advertisements, summon parties and witnesses, administer oaths, require the production of documents, take affidavits, and if so directed by the judge, examine parties and witnesses, either upon interrogatories or *vivâ voce*, as the judge directs. (c)

As soon as the certified copy of the judgment or order has been left at chambers a summons to proceed with the accounts and inquiries directed must be issued and served, in the manner pointed out *ante*, p. 188; and upon the return of the summons, the judge, if satisfied that all necessary parties have been served with notice of the judgment or order, gives directions as to the mode in which each of the accounts and inquiries is to be taken and prosecuted, and the evidence to be adduced in support thereof, and the parties who are to attend on the several accounts and inquiries, &c. (d)

In any cause or matter for the administration of the estate of a deceased person, no party other than the executor or administrator is intitled to appear either in court or in

(a) Ord. 55, rr. 28, 32.

(b) Ord. 55, r. 30.

(c) Ord. 55, r. 16.

(d) Ord. 55, r. 33.

chambers on the claim of any person not a party in respect of any debt or liability against the estate of the deceased, except by leave of the court or a judge. (a)

If upon the hearing of a summons to proceed, or at any time during the prosecution of a judgment or order, it appears to the judge that the interest of parties can be classified, he may require the parties constituting a class to be represented by the same solicitor, and may direct what parties may attend all or any of the proceedings, and where the parties constituting a class cannot agree upon a solicitor to represent them, the judge may nominate such solicitor; and if any one of the parties constituting such class insists upon being represented by a different solicitor, he must pay all costs occasioned thereby. (b)

Any of the parties other than those who have been directed to attend, may attend at their own expense, and upon paying the costs, if any, occasioned by such attendance; or, if they think fit, they may apply by summons for liberty to attend at the expense of the estate, or to have the conduct of the action. (c)

If any parties summoned to attend make default, the judge may proceed *ex parte*, if he thinks it expedient to do so; or, if he does not think it expedient to proceed *ex parte*, he may order a sum for costs to be paid to the party attending by the absent party or his solicitor personally. (d)

As before stated, matters disposed of in chambers are, in the first instance, heard before the judge's chief clerk, but any party may, before the proceedings before him are concluded, take the opinion of the judge upon any matter arising in the course of the proceedings without any fresh summons for that purpose. (e) And this is not by way of appeal, but as a right, and the party so desiring the opinion

(a) Ord. 16, r. 47.

(b) Ord. 55, r. 40.

(c) Ord. 55, r. 42.

(d) Ord. 54, rr. 5, 7, *et ante*, p. 189.

(e) Ord. 55, r. 69.

of the judge may require the chief clerk to adjourn the matter before the judge for such purpose. (a)

Upon the hearing of a summons evidence may be given by affidavit. And all affidavits which have been previously used and read in court upon any proceeding in a cause or matter, may be used before the judge in chambers. (b)

Accounts, extracts from parish registers, particulars of creditors' debts, &c., referred to by affidavit, are not to be annexed to the affidavit, or referred to in the affidavit as annexed, but are to be referred to as exhibits; and the certificate on the exhibit referred to in the affidavit signed by the commissioner taking the affidavit must be marked with the short title of the cause or matter. (c)

Notice of the intention to use an affidavit in chambers must be given to the other parties. (d)

A person may be cross-examined on his affidavit by order of the court or a judge, on the application of either party. (e)

When an account is directed to be taken by a judgment or order, it may, either by the same or any subsequent order, be directed that the books of account in which the accounts in question have been kept, shall be taken as *prima facie* evidence of the truth of the matters therein contained, with liberty to the parties interested to take objections thereto. (f)

The accounting party must, unless otherwise ordered, verify his account by affidavit. The items on each side of the account must be numbered consecutively, and the account must be referred to by the affidavit as an exhibit, and left in chambers, or with the referee, if he is ordered to take the account. (g)

Any party seeking to charge an accounting party beyond what he has by his account admitted to have received, must

(a) See *Smith v. Watts*, 22 Ch. Div. 5; 48 L. T. Rep. N. S. 169; 52 L. J. 209, Ch.; 31 W. R. 262.

(b) Ord. 38, rr. 1, 21.

(c) Ord. 38, rr. 23, 24.

(d) Ord. 38, r. 20.

(e) Ord. 38, r. 1.

(f) Ord. 33, r. 3.

(g) Ord. 33, r. 4.

give notice thereof to the accounting party, stating as far as he is able, the amount sought to be charged, and the particulars thereof in a short and succinct manner. (a)

The judge in chambers may obtain the assistance of accountants, merchants, actuaries, and other scientific persons, the better to enable any matter at once to be determined, &c. (b)

When it is necessary to ascertain what parties are interested under a judgment or order, an advertisement is issued asking them to come forward, as for creditors, heirs, next of kin, &c. The advertisement is prepared by the party prosecuting the judgment or order, and is approved and signed by the chief clerk. The advertisement for creditors and claimants, fixes a time within which each claimant, not being a creditor, is to come in and prove his claim, and within which each creditor is to send to the executor or administrator, or his solicitor, the name and address of such creditor, and the full particulars of his claim, and a statement of his account, and the nature of the security, if any, held by him. A time is also fixed for adjudicating on the claims. (c)

A peremptory advertisement and only one is issued, unless for special reasons it is thought necessary to issue a second or further advertisement; and any advertisement may be repeated as many times and in such papers as may be directed. (d)

Unless otherwise ordered, all persons who do not come in and prove their claims within the time fixed for such purpose by the advertisement, are to be excluded from the benefit of the judgment or order. And after this time no claims are to be received (except in case of an adjournment day for hearing undisposed of claims), unless the judge at chambers, on application by summons, gives special leave, and then

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(a) Ord. 33, r. 5.  
(b) Ord. 55, r. 19.

(c) Ord. 55, rr. 44, 46, 47.  
(d) Ord. 55, r. 45.

upon such terms as to costs and otherwise as the judge thinks fit. (a)

Claimants filing affidavits need not take office copies, it being the duty of the person who examines the claims to do this, and produce them at the hearing, unless the judge otherwise directs. (b)

A creditor need not make any affidavit nor attend in support of his claim, except to produce his security, unless he is served with a notice requiring him to do so. But he is bound to produce his security, if any, at the time specified in the advertisement; and, if required by notice in writing from the executor or administrator, he must produce all other deeds and documents necessary to substantiate his claim at the time specified in the notice before the judge at chambers; and in case of neglect or refusal to do this, he is not to be allowed any costs of proving his claim, unless otherwise ordered. (c)

The executor or administrator, or such other party as the judge shall direct, after examining the claims of creditors sent in, must, seven clear days before adjudication, file an affidavit, made by him either alone or jointly with his solicitor, &c., verifying a list of the claims sent in pursuant to the advertisement, stating which of such claims, or parts thereof, are in his opinion and belief justly due, and proper to be allowed against the estate of the deceased, and the reasons for such belief. (d)

If on the day appointed for hearing the claims any of them remain undisposed of, an adjournment day for hearing them is to be fixed; and where further evidence is to be adduced, a time may be named for closing evidence on both sides. (e)

At the adjudication of the claims of creditors the judge

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(a) Ord. 55, rr. 44, 57.

(b) Ord. 55, r. 48.

(c) Ord. 55, rr. 49, 50, 51.

(d) Ord. 55, r. 52.

(e) Ord. 55, r. 54.

may allow any of them, wholly or in part, without proof by the creditors, or, if he thinks fit, require any creditor to attend and prove his claim, or any part of it, and direct an investigation of any claims not allowed, &c. (a)

Notice must be given by the executor or administrator, or such other party as the judge shall direct, to every creditor whose claim, or part thereof, has been allowed without proof; also to every creditor whom the judge directs to attend and prove his claim, or part of it, by a time to be named in the notice, not being less than seven days after such notice, such time being the adjournment day for adjudication on claims, and if any creditor fails to comply with the notice, his claim, or the part specified, is to be disallowed. (b)

A creditor who has established his debt in chambers under a judgment or order, is entitled to the costs of so establishing it, and the sum to be allowed for his costs is to be fixed by the judge, unless he thinks fit to direct the taxation thereof; and the amount of such sum or costs is to be added to the debt established. (c)

Where any judgment or order is made for payment by the Postmaster-General to creditors, the party prosecuting the judgment or order must send to each creditor or his solicitor a notice that the cheque may be received from the Postmaster-General, and, if required, produce the judgment or order and other papers necessary to enable the creditors to receive their cheques and get them passed. (d)

Where a judgment or order is made directing an account of the debts of a deceased person, interest is to be computed on such of them as carry interest at the rate they respectively carry, and as to all others, at the rate of four per cent. per annum from the date of the judgment or order, unless otherwise ordered. Where the debt does not carry interest which is established in chambers under a judgment or order,

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(a) Ord. 55, r. 55.

(b) Ord. 55, r. 56.

(c) Ord. 55, r. 58.

(d) Ord. 55, r. 60; *et ante*, p. 90.

this interest is to be payable out of any assets which remain after satisfying the costs of the cause or matter, the debts established, and the interest of such debts as by law carry interest. (a)

So where an account of legacies is ordered, interest is to be computed on them after the rate of four per cent. per annum from the end of one year after the testator's death, unless otherwise ordered, or unless any other time of payment or rate of interest is directed by the will. (b)

When the accounts have been taken and the inquiries made and the claims adjudicated on, or the other proceedings directed taken, the judge's chief clerk states the result thereof in a concise certificate to the judge. The certificate must not, unless circumstances render it necessary, set out the judgment or order, or any documents, or evidence or reasons, but must refer thereto, or particular paragraphs thereof, so that it may appear upon what the result stated in the certificate is founded. (c)

Where an account is directed, the certificate must not set out the account by way of schedule, but must state the result of the account, and refer to it verified by the affidavit filed, and specify by the numbers attached to the items therein which, if any, of such items have been disallowed or varied, or added to by way of surcharge. (d)

Where the account verified by the affidavit has been so altered that a fair transcript becomes necessary, it is to be made by the party prosecuting the judgment or order, and is then to be referred to by the certificate. The account and the transcript, if any, are to be filed in the Central Office forthwith, or retained in chambers and ultimately filed, as the judge in chambers directs. No copy of the account, however, need be taken by any party. (e)

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(a) Ord. 55, rr. 62, 63.

(b) Ord. 55, r. 64.

(c) Ord. 55, rr. 65, 66.

(d) Ord. 55, r. 68.

(e) Ord. 55, r. 68.



It is not now necessary for the judge to sign the certificate, and unless an order to discharge or vary it is made, it is to be deemed to be approved and adopted by the judge. But when the certificate is settled and transcribed it must be signed by the chief clerk. (e)

After the certificate has been transmitted by the chief clerk to the Central Office to be filed it is then binding on all the parties to the proceedings, unless discharged or varied upon summons before the expiration of eight clear days after such filing; but applications to discharge or vary certificates to be acted upon by the Postmaster-General without further order, or certificates on passing receiver's accounts, must be made within two clear days after the filing thereof. (b)

The judge may, if special circumstances require it, upon an application by motion or summons, direct a certificate to be discharged or varied at any time after it has become binding on the parties. (c)

As to keeping notes of proceedings in chambers, and as to the mode of drawing up orders in chambers, see *ante*, p. 189.

When any matter originating in chambers has at the hearing been adjourned for further consideration in chambers, such matter may, after the expiration of eight days, and within fourteen days from the filing of the chief clerk's certificate, be brought on for further consideration by a summons to be taken out by the party having the conduct of the matter, which must be served six clear days before the return; after the expiration of such fourteen days the summons may be taken out by any other party. This rule does not apply to any matter the further consideration whereof has been adjourned into court, (d) the practice whereon will be found detailed in the following chapter.

If in any cause or matter relating to any real estate it appears necessary or expedient that it, or any part of it,

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(a) Ord. 55, rr. 65, 67.

(b) Ord. 55, r. 70.

(c) Ord. 55, r. 71.

(d) Ord. 55, r. 72.

should be sold, the court or a judge may order the same to be sold. (a)

Where a judgment or order is given or made, whether in court or in chambers, directing any property to be sold, the same must, unless otherwise ordered, be sold with the approbation of the judge to whom the cause or matter is assigned, to the best purchaser that can be got, to be allowed by the judge. (b)

The sale is conducted through the intervention of the judge's chief clerk in chambers. The remarks made *ante*, p. 221, as to carrying the judgment or order into chambers and taking out a summons to proceed, apply when a sale is directed.

Before any estate or interest is put up for sale under a judgment or order, an abstract of the title must, unless otherwise ordered, be laid before some conveyancing counsel approved by the court or a judge for his opinion thereon, to enable proper directions to be given respecting the conditions of sale and other matters connected with the sale. (c)

The conditions of sale must specify a time for the delivery of the abstract of title to the purchaser or to his solicitor. (d)

Affidavits for the purpose of enabling the judge to fix reserved biddings must state the value of the property by reference to an exhibit containing such value, so that the value may not be disclosed by the affidavit when filed. (e)

As soon as particulars and conditions of sale settled at chambers are printed, two copies thereof, certified by the solicitor to be correct prints of the particulars and conditions settled at chambers, are to be left at chambers. (f)

The court or judge may refer to the conveyancing counsel of the court any matter relating to the investigation of the title to an estate with a view to a sale or purchase thereof, or

(a) Ord. 51, r. 1.

(b) Ord. 51, r. 3.

(c) Ord. 51, r. 2.

(d) Ord. 51, r. 2.

(e) Ord. 51, r. 4.

(f) Ord. 51, r. 5.

to the settlement of the draft of a conveyance, mortgage, settlement, or other instrument, or any other matter which the court or judge may think fit to refer, and may receive and act upon the opinion given in the matter referred. (a)

After the affidavit of value and the exhibit thereto are left in chambers, an appointment is served for the purpose of fixing the biddings, the place of sale, appointment and remuneration of the auctioneer, and other usual requisites on a sale by auction. (b)

The sale having taken place, an office copy of the affidavit of the person appointed to sell, of the result of the sale, with the bidding paper and particulars therein referred to, must be left at chambers at least one clear day before the day appointed for settling the certificate of the result of the sale. (c)

After the title is approved by the purchaser, he obtains an order for payment of the purchase money into court.

All proper parties must join in the sale and conveyance as the judge directs; and any party bound by the order for sale and in possession of the estate, or in receipt of the rents and profits thereof, will be compelled to deliver up such possession or receipt to the purchaser, or such other person as may be directed. (d)

In case of fraud or improper conduct in the management of the sale, the court may open the biddings and order the property to be resold on such terms as to costs or otherwise as the court or judge thinks fit. (e)

Where a summons has been heard in chambers and an order made by the judge and not adjourned into court, and there is a desire to appeal against it, the proper course is to make an application in chambers and not to move in court. (f)

(a) Ord. 51, r. 7.

(b) See 1 Alph. Pr. 738.

(c) Ord. 51, r. 6.

(d) Ord. 51, rr. 1, 3.

(e) 31 & 32 Vict. c. 48, s. 7.

(f) *Re Bullers Wharf Company*,  
21 Ch. Div. 131.

## CHAPTER XXIII.

### FURTHER CONSIDERATION.

WHEN a cause or matter has been adjourned for further consideration, the same may, after the expiration of eight days and within fourteen days from the filing of the chief clerk's certificate, be set down by the registrar for further consideration, on the written request of the solicitor for the plaintiff or party having the conduct of the proceedings; and after the expiration of such fourteen days the cause or matter may be set down on the written request of the solicitor for the plaintiff or any other party. (a)

The solicitor setting down the cause or matter must produce to the registrar the judgment or order adjourning further consideration, or an office copy thereof, and an office copy of the chief clerk's certificate, or a memorandum of the date of the filing of the certificate, indorsed on the request by the proper officer; and notice thereof must be given to the other parties in the action at least six days before the day for which the same is marked for further consideration. (b)

The cause or matter, when so set down, is not to be put into the paper for further consideration until the expiration of ten days from the day on which the same was so set down. (c)

The cause is heard on further consideration before the judge before whom the original hearing took place.

No further evidence than the certificate, as to matters

(a) Ord. 36, r. 21.

(b) Ord. 36, r. 21.

(c) Ord. 36, r. 21.

directly in issue in the cause, will be received on the hearing on further consideration; but if necessary the court will, at the suggestion of counsel, direct further inquiries as to such matters, and matters not directly in issue may, if the court thinks fit, be proved by affidavit. Copies of the judgment or order adjourning the further consideration, and the chief clerk's certificate, and any other orders or certificates referred to at the hearing, should be left by the solicitor setting down the cause for the use of the judge. (a)

At the hearing on further consideration the court will make such further order in the cause as, upon reading the chief clerk's certificate, appears to be consistent with the justice of the case as it stands upon the judgment and certificate. (b)

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(a) 1 Alph. Pr. 409, 410.

| (b) 1 Alph. Pr. 410.

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CHAPTER XXIV.

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## COSTS.

SUBJECT to the provisions of the Judicature Acts and the Rules of Court, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, are in the discretion of the court or judge. Nothing herein contained is, however, to deprive an executor, administrator, trustee, or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division. (a)

And where a cause, matter, or issue is tried with a jury, the costs are to follow the event, unless the judge by whom such cause, &c., is tried, or the court, for good cause, otherwise orders. (b)

Costs are allowed first as between party and party, and secondly as between solicitor and client, the former being taxed more strictly than the latter. It is of the former we propose to treat.

Costs are taxed on two scales, viz., the higher and the lower scale.

In future solicitors will be only entitled to charge and be allowed the fees set forth in the lower scale in all causes or matters, and no higher fees are to be allowed in any case, except such as are by this order otherwise provided for. (c)

The higher scale of fees may be allowed either generally

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(a) Ord. 65, r. 1.  
(b) Ord. 65, r. 1.

(c) Ord. 65, r. 8.

in any cause or matter, or as to the costs of some particular application made or business done in the cause or matter, if, on special grounds arising out of the nature and importance, or the difficulty or urgency of the case, the court or judge, at the trial or hearing, or further consideration of the cause or matter, or at the hearing of any application therein, whether the cause or matter be or be not brought to trial or hearing, or further consideration, so orders; or if the taxing master, under directions given for that purpose by the court or a judge, thinks that such allowance ought to be so made upon the special grounds above stated. (a)

The court will not order a taxation on the higher scale merely on account of the amount of the subject-matter in controversy, that not constituting "special grounds," &c. (b)

Every reference for the taxation of costs in the Chancery Division must as a rule be made to the taxing master in rotation. (c)

Every bill of costs left for taxation must be indorsed with the name and address of the solicitor by whom it is so left, and also with the name and address of the solicitor for whom he is agent, if any, including any solicitor who is entitled or intended to participate in the costs to be taxed. (d)

One day's notice of taxing costs, together with a copy of the bill of costs and affidavit of increase, if any, must be given by the solicitor of the party whose costs are to be taxed to the other party or his solicitor, in all cases where a notice to tax is necessary. Notice to tax is not necessary in any case where the defendant has not appeared in person or by solicitor or by guardian. (e)

Where costs are to be paid or borne by another party, no costs are to be allowed which do not appear to the taxing master to have been necessary or proper for the attainment of justice or defending the rights of the party, or which

(a) Ord. 65, r. 9.

(b) *In re Spettigue's Trust*, 32 W. R. 385; W. N., 1884, p. 6.

(c) Ord. 65, r. 18.

(d) Ord. 65, r. 27, sub-r. 58.

(e) Ord. 65, rr. 16, 17.

appear to have been incurred through over caution, negligence, or mistake, or merely at the desire of the party. (a)

And the court or judge may at the hearing of any cause or matter, or upon any application in court or in chambers, and whether the same is objected to or not, direct that the costs of any indorsement on a writ of summons, pleading, or other proceeding which is improper, vexatious, or unnecessary, or caused by misconduct or negligence, be disallowed, or may direct the taxing officer to disallow the costs thereof; and the party whose costs are so disallowed must pay the costs occasioned thereby to the other parties; and in any case where such question has not been dealt with by the court or judge, it is the duty of the taxing officer to deal with it for the above purpose, and to the same result. (b)

Upon interlocutory applications, where the court or a judge thinks fit to award costs to any party, the order may direct payment of a gross sum in lieu of taxed costs, and by and to whom such gross sum is to be paid. (c)

Where any party entitled to costs refuses or neglects to bring in his costs for taxation, or to procure the same to be taxed, and thereby prejudices any other party, the taxing officer is to be at liberty to certify the costs of the other parties, and also certify such refusal or neglect; or may allow such party refusing or neglecting a nominal or other sum for such costs, so as to prevent any other party being prejudiced by such refusal or neglect. (d)

The taxation of a bill of costs in the Chancery Division is conducted in the following manner: the bill of costs is copied on foolscap paper, with a margin for deductions on the left-hand side, the name of the taxing master in rotation is next obtained, and a certified copy of the judgment or order indorsed with a reference to the master, and marked by his clerk, and a copy of the bill of costs, are left with

(a) Ord. 65, r. 27, sub-r. 29.  
(b) Ord. 65, r. 27, sub-r. 20.

(c) Ord. 65, r. 23.  
(d) Ord. 65, r. 27, sub-r. 28.



such clerk. The various papers in the cause arranged in proper order, with vouchers for all fees and disbursements must also be left with the taxing master's clerk. A warrant on leaving is then taken out, and warrant to tax is also issued and copies served on the opposite party. The solicitors for the parties attend the taxing master on the day appointed for taxation, and the master taxes the bill. The bill is then cast up by the solicitors and the deductions subtracted, after which they are checked by the taxing master's clerk and the bill is signed by the taxing master. (a)

If it is intended to enforce payment of the costs, or if evidence of the amount is required, a certificate of the taxation must be obtained from the taxing master and filed in the Central Office, and an office copy obtained. (b)

Any party who is dissatisfied with the allowance or disallowance by the taxing master of the whole or any part of any item or items may, before the certificate or allocatur is signed, deliver to opposite party, and carry in before the taxing master, a written objection to such allowance or disallowance, concisely specifying them and the grounds of such objection, and may thereupon apply to the taxing master to review the taxation thereof; whereupon the taxing master is to reconsider and review his taxation upon such objections. (c)

No subpoena for the payment of costs, and, unless by leave of the court or a judge, no sequestration to enforce such payment can be issued. (d)

When any money or costs are payable under a judgment or order to any person, he is, so soon as the money or costs are payable, entitled to issue one or more writs of *fi. fa.* or *elegit* to enforce payment, but if the judgment or order is for payment within a period therein mentioned, no such writ can be issued until after the expiration of such period: and the court or judge may stay execution until a time to be fixed. (e)

(a) Ayck. Pr. 427, 428, 9th ed. ; 1 Alph. Pr. 237, 240. (b) 1 Alph. Pr. 240.	(c) Ord. 65, r. 27, sub-rr. 39, 40. (d) Ord. 43, r. 7. (e) Ord. 42, r. 17.
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In certain cases a plaintiff may be compelled to give security to the defendant for the costs which may be payable by such plaintiff. Thus, if a plaintiff resides out of the jurisdiction of the court (not being in Scotland or Ireland), the defendant is entitled to an order for security for costs. (a) If, however, there are several plaintiffs, they must all reside abroad in order to entitle the defendant to this order, for if one be within the jurisdiction the defendant is not entitled to security. (b) Neither will the plaintiff be ordered to give security where he is residing abroad in actual service as a British officer. (c) But if the plaintiff appears to have no fixed residence, he will be ordered to give security; and if the plaintiff's residence as described be insufficient or vague, security will be ordered. (d) A plaintiff will not, however, be compelled to give security merely on the ground that at the time of commencing his action the plaintiff was not actually resident at the place of which he is described. (e)

And if a defendant admits a plaintiff's claim, a foreigner residing abroad, and sets up an independent counter-claim, such defendant is not entitled to security for costs. (f)

Since the Married Women's Property Act, 1882, a married woman is not liable to give security for costs. (g)

A limited company suing may be ordered to give security for costs if it appears that the assets of the company will not be sufficient to pay the defendant's costs if he succeeds in his defence. (h)

(a) *Ayck. Pr.* 432, 9th ed.; *Republic of Costa Rica v. Erlanger*, 3 Ch. Div. 62; 45 L. J. 743, Ch.; *Redondo v. Chaytor*, 4 Q. B. Div. 453; 40 L. T. Rep. N. S. 797; 27 W. R. 701; *Raeburn v. Andrews*, 9 Q. B. Div. 118.

(b) *Walker v. Easterly*, 6 Ves. 611; *D'Hormusgee & Co. v. Grey*, 10 Q. B. Div. 13.

(c) *Evelyn v. Chippendale*, 9 Sim. 497.

(d) *Oldale v. Whitehead*, 32 L. T. 269.

(e) *Hurst v. Padwick*, 17 L. J. 169, Ch.

(f) *Winterfield v. Bradnum*, 3 Q. B. Div. 224, C. A.; 47 L. J. 270, Q. B.; 38 L. T. Rep. N. S. 250; 26 W. R. 742.

(g) *Threlfall v. Wilson*, 8 Prob. Div. 18; *Severance v. Civil Service Supply Association*, 48 L. T. Rep. N. S. 485.

(h) 25 & 26 Vict. c. 89, s. 69.

It was formerly held that the defendant should lose no time in applying for security for costs after the facts relied upon came to his knowledge, for, if he took any subsequent steps in the cause with such knowledge, he waived his right to security. (a) But it has lately been decided that the court may, in a proper case, at any time during the action, order that security be given, although no previous application has been made. (b)

In any cause or matter in which security for costs is required, the security is to be of such amount and given at such times and in such manner and form as the court or judge directs. (c)

Where a bond is to be given as security for costs, it must, unless the court or a judge otherwise directs, be given to the party or person requiring the security, and not to an officer of the court. (d)

As to security for costs on an appeal, see *ante*, pp. 196, 199.

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| (a) Ayck. Pr. 434, 9th ed.               | L. T. Rep. N. S. 893; 52 L. J. |
| (b) <i>Lydney and Wigpool Iron Ore</i>   | 385, Ch.                       |
| <i>Co. v. Bird</i> , 23 Ch. Div. 358; 48 | (c) Ord. 65, r. 6.             |
|  | (d) Ord. 65, r. 7.             |

## CHAPTER XXV.

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### A SUMMARY OF THE PROCEEDINGS IN AN ACTION IN THE QUEEN'S BENCH DIVISION OF THE HIGH COURT.

WE now propose to give a summary of the proceedings in an action in the Queen's Bench Division, showing in what particulars the practice in actions in the Chancery and Queen's Bench Divisions chiefly differs. First, however, it will be necessary to trace the origin of the jurisdiction of the Queen's Bench Division.

#### ORIGIN AND HISTORY OF THE COURTS OF COMMON LAW.

The Superior Courts of Common Law were the Queen's (or King's) Bench, the Common Pleas, and the Exchequer.

The Queen's (or King's) Bench is the remains of the Aula Regis, and for that reason the reigning monarch might order it to accompany his own person, which privilege Edward I. enforced by commanding it to follow him to Roxburgh, in Scotland, where it sat for some time. But for many centuries past, except during the civil wars and the plague, it was stationary at Westminster, having a chief justice and a staff of puisne judges and ministerial officers, the most important being the masters.

The jurisdiction of this court was twofold, having a civil or plea side, and a criminal or crown side. It had also a superintending power over inferior tribunals.

At first the Queen's Bench had no jurisdiction over purely

civil causes, yet by a series of fictions it obtained such jurisdiction: for it declared that a person in custody of its marshal was before it for every purpose; and as actions of *trespass* were still considered to be within its jurisdiction, being criminal in their nature, and the defendant liable to pay a fine to the Crown, the plaintiff was permitted to issue a writ, called a bill of Middlesex, charging the defendant with a trespass, which, being then a cause for which a man might be arrested, he was taken and committed to the Marshalsea, and being once there the plaintiff was at liberty to declare against him for any other cause of action. This principle was afterwards carried to a greater extent, it being held that the defendant's appearance, or putting in bail, answered the same purpose; for then, although not in the *real*, he was in the *constructive* custody of the marshal. And on account of this fiction, till the passing of the statute 2 Will. 4, c. 39, all writs issuing out of the Queen's Bench described the cause of action to be *trespass*, in bailable cases mentioning the real ground afterwards in an *ac etiam* clause, as if it were merely subsidiary to the fictitious one; and every declaration by bill in the Queen's Bench stated the defendant to be in the custody of the marshal of the Marshalsea, (a)

The Court of Common Pleas, sometimes called the Court of Common Bench, was also a court of record, having a similar number of judges and other officers, as the Court of Queen's Bench, and they were appointed in a similar manner.

This court seems to have been first separated or distinguishable from the Aula Regis in the time of Richard I., or perhaps in that of King John, though, according to Mr. Maddox, it was not firmly established as an independent tribunal till the reign of Henry III. This opinion may have arisen from the fact that it was directed in Magna Charta

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(a) Sm. Act. Law, Ch. 1; Broom, Com. Law, Ch. 2.

that the Common Pleas should thenceforth remain stationary at Westminster, which Act was confirmed by Henry III. (a)

The jurisdiction of this court was confined to civil matters only. But it had exclusive jurisdiction in the following cases: Registration of judgments, and writs of execution under the Acts 1 & 2 Vict. c. 110, 2 & 3 Vict. c. 11, 3 & 4 Vict. c. 82, 18 Vict. c. 15, 23 & 24 Vict. c. 38, 27 & 28 Vict. c. 112; under the 3 & Will. 4, c. 74, as to the acknowledgment of deeds by married women passing their property; and in appeals from Revising Barristers' Courts.

The Court of Exchequer of Pleas was also presided over by five judges, a Lord Chief Baron, and four puisne barons, created by patent, who were assisted by a similar staff of masters and other officers, as the other two courts.

This court seems to have been the first offshoot from the great Aula Regis, and to it all matters relating to the king's revenue were consigned. It had at first no other jurisdiction, but, like the Queen's Bench, extended its jurisdiction by a fiction; for the plaintiff in his writ and declaration stated that he was "a debtor to the king," and less able to pay his debts by reason of the defendant's not paying the plaintiff, and the writ was from this cause called the writ of *quo minus*; and this statement, though in ninety-cases out of a hundred a mere fiction, was not allowed to be contradicted, and was held to render the cause of action a matter affecting the revenue, so as to invest the Exchequer with a jurisdiction over it. It also by similar means gained an equitable jurisdiction between subject and subject.

Thus did the Queen's Bench and Exchequer of Pleas gain a jurisdiction over civil matters, by means of a fiction. By the Uniformity of Process Act (2 Will. 4, c. 39), however, though this jurisdiction was fully recognised, the fictitious mode of proceeding was abolished, and the 15 & 16 Vict. c. 76, gave the three Superior Courts a concurrent jurisdiction

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(a) See Broom's Com. Law, Ch. 2; Sm. Act. Law, Ch. 1.

in personal actions, which was in all cases commenced by writ of summons. The equitable jurisdiction of the Court of Exchequer was taken away by the 5 Vict. c. 6, and transferred to the Court of Chancery. (a)

There were also Courts of *Nisi Prius* held for the trial of issues of fact before a jury and presiding judge. The origin and history of these courts may be thus shortly stated. There was a sort of real action called an *assize*, which was tried in the very county in which the land in question lay, by judges holding the king's commission for that purpose, and who were styled *justices of assize*. The justices of assize came into use in the room of the ancient justices in eyre, *justiciarii in itinere*; who seemed to have been established by Henry II., being delegated from the *Aula Regis*, and looked upon as members thereof; and they made their circuit round the kingdom once in seven years, for the purpose of trying causes; afterwards, by *Magna Charta*, they were ordered to go once a year. By the 1 Edw. 13, c. 30, usually termed the Statute of *Nisi Prius*, it was enacted that these justices of assize should try other issues, return the verdicts into the court above, and in order to enable them to do so, the old writ of *venire* (now abolished) was altered, and instead of ordering the sheriff to return the jurors to the court at *Westminster*, he was ordered to bring them to *Westminster* on a certain day, *Nisi Prius*, *i.e.*, unless before that day the justices of assize came into the county; for then the statute rendered it his duty to return the jury, not to the court, but before the justices of assize. Hence it is that judges are said to sit at *Nisi Prius*, and trials to take place at the *assizes*; though the real actions of assize long ago became obsolete, and were altogether abolished by statute 3 & 4 Will. 4, c. 27. And, as stated *ante*, p. 9, the jurisdiction possessed and exercised by the courts created by Commis-

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(a) See Broom's Com. Law, Ch. 2; Sm. Act. Law, Ch. 1.

sions of Assize is, by the 36 & 37 Vict. c. 66, s. 16, transferred to and vested in the High Court of Justice.

THE QUEEN'S BENCH DIVISION, ITS JUDGES AND OFFICERS  
UNDER THE JUDICATURE ACTS.

As we have stated (*ante*, p. 9), the Courts of Queen's Bench, Common Pleas, and Exchequer ceased to exist as separate courts, being consolidated together with the Court of Chancery and the Courts of Probate, Divorce, and Admiralty, &c., into one Supreme Court by the Judicature Acts, and separated into two great divisions, the High Court of Justice and the Court of Appeal.

The Queen's Bench Division, the Common Pleas Division, and the Exchequer Division continued as three separate divisions of the High Court, each with a president and staff of judges, until the year 1880. In that year, by an Order in Council, the offices of Chief Justice of the Common Pleas and Chief Baron of the Exchequer were abolished, and the Common Pleas Division and the Exchequer Division were merged into and consolidated with the Queen's Bench Division, which now has jurisdiction in all those matters and proceedings formerly possessed by the Common Pleas and Exchequer Divisions, as well as its own original jurisdiction. (*a*)

To the Queen's Bench Division also has been assigned the jurisdiction of the London Bankruptcy Court, which is now united and consolidated with the Supreme Court. (*b*)

The judges of the Queen's Bench Division are the Lord Chief Justice of England, who is president, and a large staff of judges of first instance. (*c*)

A judge sitting in court is deemed to constitute a court of the High Court of Justice, and may exercise the jurisdiction

(*a*) Order in Council, Dec. 16, 1880.

(*b*) 46 & 47 Vict. c. 52, s. 93; Ord. Jan. 1, 1884.

(*c*) 36 & 37 Vict. c. 66, s. 31; Ord. Col. *sup*.



detailed *ante*, pp. 10, 11, which is the usual mode of constituting a court for the dispatch of business in the Chancery Division. And in the Queen's Bench Division, proceedings in an action therein are, so far as practicable and convenient, to be heard and determined before a single judge, and including all proceedings subsequent to trial down to and including final judgment, except proceedings on appeal and proceedings otherwise excepted. (a)

Divisional Courts of the High Court may, however, be held for the transaction of any business which may, for the time being, be ordered by Rules of Court to be heard before such courts. And any such Divisional Court is to be constituted of two judges and no more, unless the president of the division to which such divisional court belongs, with the concurrence of a majority of the other judges of such division, is of opinion that it should consist of more than two, in which case it is to consist of such number of judges as may be thought expedient. (b)

The following proceedings and matters are to be heard and determined before Divisional Courts, saving, however, the power of a single judge to hear and determine such proceedings and matters as he has heretofore had power to do:

(1) Proceedings on the Crown side of the Queen's Bench Division; (2) Appeals from revising barristers, and proceedings relating to parliamentary and municipal election petitions; (3) Appeals under sect. 6 of the County Courts Act, 1875; (4) Proceedings on the revenue side of the Queen's Bench Division; (5) Proceedings directed by any statute to be taken before the court, and in which the decision is final; (6) Cases stated by the Railway Commissioners under the 36 & 37 Vict. c. 48; (7) Cases of *habeas corpus*, in which the judge directs that an order *nisi* for the writ, or the writ be made returnable before a divisional court; (8) Special cases where all parties agree that the same be heard before a

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(a) 39 & 40 Vict. c. 59, s. 17.

(b) 39 & 40 Vict. c. 59, s. 17.

divisional court; (9) Appeals from chambers in the Queen's Bench Division; (10) Applications for new trials where there has been a trial with a jury. (a)

The Courts of Appeal have already been described *ante*, pp. 12, 13.

The officers of the Supreme Court are mentioned *ante*, p. 14, but of these the chief clerks and the taxing masters do not exercise their functions with respect to causes and matters administered in the Queen's Bench Division. The masters of the Supreme Court, as regards the Queen's Bench Division, perform duties analogous to those performed by the chief clerks and taxing masters of the Chancery Division. It being provided that a master may transact all such business and exercise all such authority and jurisdiction as may be transacted or exercised by a judge at chambers (as also the taxation of costs), (b) except in respect of the matters mentioned *post*, tit. "Interlocutory Applications—Summons at Chambers."

#### SITTINGS AND VACATIONS OF THE COURT.

These are the same in both the Chancery and Queen's Bench Divisions.

It should, however, be mentioned here that the courts held for the trial of causes and issues under commissions of assize are held irrespective of these sittings and vacations. (c)

#### COMMENCEMENT OF PROCEEDINGS.

The Procedure Acts, and the Rules of Practice made under them, were framed to introduce uniformity of practice in the Chancery and Queen's Bench Divisions of the High Court in civil actions. All actions are now commenced by writ of summons. There is one uniform system of pleading therein, and a defence which would be good in equity is

(a) Ord. 59, r. 1.

(b) Ord. 5, r. 6; Ord. 54, r. 12.

(c) See 36 & 37 Vict. c. 66, ss.

29, 37; 38 & 39 Vict. c. 77, ss. 8, 23.

equally good at common law. There is also the same tribunals of appeal for both divisions, and the same mode of reaching such tribunals.

Still, the Judicature Act, 1873, marks out distinctly the separate jurisdictions of the Chancery and Queen's Bench Divisions, (a) which, to some extent, necessarily entails a divergence in their practice, and which is recognised in the Rules of the Supreme Court, 1883 and 1884, as we will endeavour to show in the following outline :

It has been shown *ante*, pp. 11, 17, what are the causes or matters that are assigned to the Chancery Division. In the Queen's Bench Division (b) an action is usually brought to recover a debt or damages, arising upon a contract, express or implied, as upon a bill of exchange or promissory note, or on a charter-party, or on a bond or covenant under seal ; or for work done and materials supplied, or for goods sold and delivered ; or to recover damages for some tort committed, as for a libel or slander, or for a collision at sea, or on land ; or to recover possession of land and damages for its wrongful detention, &c.

#### THE WRIT OF SUMMONS.

All actions are commenced by writ of summons ; and the practice in regard thereto, stated *ante*, pp. 17, 18, applies to actions in the Queen's Bench Division, except that every action in this division (not proceeding in a district registry) is to be assigned to one of the masters of the Supreme Court, and all documents and proceedings therein are thereafter to be marked with the name of the master to whom the action has become so assigned, and every application or proceeding therein which can be heard and dealt with by a master, including taxation of costs, are to be heard and dealt with by him, subject to the power of transfer by the Lord Chief Justice, of any action from one master to another. And during the

(a) See & 37 Vict. c. 66, ss. 34, 35.

(b) As to what matters are still

within the exclusive jurisdiction of this division, see *ante*, pp. 239, 241.

absence from illness or other urgent cause, &c., of a master to whom an action may have been assigned, any other master may hear and dispose of applications therein in his place. (a)

In the Chancery Division it will be remembered the writ is marked with the name of one of the judges of that division, as stated *ante*, p. 18, and applications or proceedings relating to matters of practice or detail in the action are usually taken before such judge's chief clerk, as stated *ante*, pp. 188, 216, and costs in this division are taxed by a separate staff of officers styled taxing masters, as detailed *ante*, p. 235.

#### PARTIES TO ACTIONS.

The rules detailed *ante*, pp. 19 to 35, as to parties to actions, and as to substituting parties, apply to actions brought in the Queen's Bench Division; however, as the administration of deceased persons' estates, and the execution of trusts are specially assigned to the Chancery Division, the rules as to parties in these matters will no doubt be more frequently acted upon in the Chancery Division than in the Queen's Bench Division.

#### INDORSEMENTS ON THE WRIT.

The rules of practice relating to the necessary indorsements on writs of summons stated *ante*, pp. 35 to 38, apply to proceedings in the Queen's Bench Division, as well as to proceedings in the Chancery Division. But as already shown (*ante*, p. 36), the class of actions assigned to the Chancery Division are not such as will ordinarily permit of an indorsement being made on the writ of summons of the nature of the claim with a view to obtaining final judgment on default of appearance, or to proceedings under Order XIV., stated *ante*, pp. 36, 53. In the Queen's Bench Division, however, it is otherwise. And in all actions where the plaintiff seeks only to recover a debt or liquidated demand in money payable by

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(a) Ord. 5, rr. 6, 7, 8.

the defendant, with or without interest, arising upon a contract, express or implied, simple or special, or on a statute, where the amount is a fixed sum of money other than a penalty, or on a trust, or for the recovery of land, as detailed *ante*, p. 37, the writ should be specially indorsed, with a statement of the plaintiff's claim, or of the remedy or relief to which he claims to be entitled. And where the claim is for a debt or liquidated demand only, the indorsement, besides stating the nature of the claim, must state the amount claimed for debt and costs respectively, and that upon payment thereof, within four days after service, or in case of a writ not for service within the jurisdiction within the time allowed for appearance, further proceedings will be stayed. The defendant may, notwithstanding such payment, have the costs taxed, and if more than a sixth be disallowed, the plaintiff's solicitor must pay the costs of taxation. (a)

#### JOINDER OF CAUSES OF ACTION.

Several causes of action may be joined in one action in the Queen's Bench Division under the same conditions as in an action in the Chancery Division, stated *ante*, pp. 38 to 40.

#### ISSUE AND SERVICE OF THE WRIT.

The writ is issued and served in an action in the Queen's Bench Division in the same manner as in an action in the Chancery Division; as to which see *ante*, pp. 40 to 46.

#### RENEWAL AND AMENDMENT OF THE WRIT.

The writ may be renewed or amended as stated *ante*, pp. 46, 47.

#### DISCLOSURE AS TO ISSUE OF WRIT BY SOLICITOR, &C.

The practice hereon stated, *ante*, p. 47, applies also to an action proceeding in the Queen's Bench Division.

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a) See Ord. 3, rr. 6, 7.

## APPEARANCE.

The practice as to the mode of appearance by a defendant to the writ of summons, stated *ante*, pp. 48 to 52, is the same in both the Queen's Bench and Chancery Divisions.

## PROCEEDINGS ON DEFAULT OF APPEARANCE, &amp;c.

It has already been stated that a writ of summons issued for one of the claims assigned to the Chancery Division can seldom be indorsed for a liquidated demand with a view to final judgment by default (*ante*, pp. 36, 53, 247), but in the Queen's Bench Division, where the writ of summons is indorsed for a liquidated demand, whether specially or otherwise, and the defendant fails to appear thereto, the plaintiff may, upon filing an affidavit of service, or of notice in lieu of service (see *ante*, p. 45), enter final judgment for a sum not exceeding the sum indorsed on the writ, together with interest at the rate specified (if any) or if not so specified, at the rate of 5*l.* per cent. per annum to the date of the judgment, and costs. (a)

Where the writ is indorsed with a claim for detention of goods and pecuniary damages, or either of them, and the defendant fails to appear, the plaintiff may enter interlocutory judgment, and a writ of inquiry must be issued to assess the value of the goods and the damages, or the damages only, as the case may be, unless the court or a judge order such assessment to be ascertained in some other manner. (b)

We have already (*ante*, p. 53), pointed out the mode of proceeding in default of an appearance to an action for the recovery of land, or where the defence is limited to part only. And where the plaintiff has indorsed a claim for mesne profits, arrears of rent, or damages for breach of contract, on a writ for the recovery of land, he may enter judgment for

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(a) Ord. 13, rr. 2, 3.

| (b) Ord. 13, r. 5.

the land as mentioned *ante*, p. 53, and proceed as to the other claim indorsed by writ of inquiry, &c., as already pointed out. (a)

Where a defendant fails to appear to a writ of summons issued out of a district registry, and the defendant had the option of appearing either in the district registry or in the Central Office, judgment for want of appearance cannot be entered by the plaintiff until after such time as a letter posted in London on the previous evening in due time for delivery to him on the following morning ought, in due course of post, to have reached him. (b)

In actions where the proceedings above detailed cannot be taken, and the party served with the writ fails to appear, the plaintiff must file an affidavit of service and a statement of claim, and the action may proceed as if such party had appeared, as fully shown *ante*, p. 52, except that where the writ is indorsed with a claim on a bond within the 8 & 9 Will. 3, c. 11 (which required the plaintiff, in bringing his action, to assign the breaches made by the obligor), and the defendant fails to appear thereto, no statement of claim is to be delivered, but the plaintiff may at once suggest breaches, by delivering a suggestion thereof to the defendant or his solicitor, and proceed as mentioned in the above-named statute, and in the 3 & 4 Will. 4, c. 42, s. 16. (c)

As to the mode of proceedings where the writ is indorsed with a claim for an account, and the defendant fails to appear, see *ante*, p. 52.

Where the defendant appears to a writ of summons specially indorsed under Order III., r. 6 (see *ante*, pp. 36, 247) the plaintiff may still apply to a judge for liberty to enter final judgment, as fully detailed *ante*, pp. 53, 54.

#### GENERAL RULES AS PLEADINGS, APPLICATIONS, AND TIME.

The rules of practice stated *ante*, pp. 55 to 60, as to plead-

(a) Ord. 13, r. 9.

(b) Ord. 13, r. 11.

(c) Ord. 13, rr. 12, 14.

ings apply to proceedings in the Queen's Bench Division; as do also the general rules as to interlocutory applications (*ante*, pp. 60, 62), with these exceptions: Applications in the Queen's Bench Division are not made to the court by petition, but by motion, and a summons at chambers in this division is heard either before a judge or before one of the masters. In the Chancery Division, it will be remembered, a petition is, in certain cases, the proper mode of proceeding, and a summons at chambers is usually heard in the first instance before the judge's chief clerk.

The general rules as to time stated, *ante*, pp. 62 to 64, apply also to the Queen's Bench Division.

#### SUMMONS FOR DIRECTIONS.

The practice with respect to taking out a summons for directions (detailed *ante*, pp. 65, 66), is applicable to actions in the Queen's Bench Division.

#### STATEMENT OF CLAIM.

The remarks made, and the practice detailed under this head, *ante*, pp. 67 to 71, also apply to actions in the Queen's Bench Division.

#### THE DEFENCE.

The remarks made hereon (*ante*, pp. 72, 73) apply also to a defence to an action in the Queen's Bench Division.

#### STATEMENT OF DEFENCE.

In addition to what is stated hereon, *ante*, pp. 73 to 76, which applies equally to the Queen's Bench as to the Chancery Division, it must be further stated that in actions on bills of exchange, promissory notes or cheques (which are usually sued upon in the Queen's Bench Division), a defence in denial must deny some matter of fact; *e.g.*, the drawing, making, indorsing, accepting, or notice of dishonour of the bill or note. (a)

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(a) Ord. 21, r. 2.



In actions comprised in Order III., r. 6 (see *ante*, pp. 36, 247), to recover a liquidated amount of money arising upon a simple contract or on a bond or contract under seal, a defence in denial must deny such matters of fact, from which the liability of the defendant is alleged to arise, as are disputed, *e.g.*, in actions for goods bargained and sold, or sold and delivered, the defence must deny the order or contract, the delivery or the amount claimed; a mere denial of the debt being inadmissible. (a)

Where leave has been given to a defendant to defend under Order XIV., he must deliver his defence within the time named in the order giving such leave; or if no time is thereby limited, then within eight days after the order. (b)

Where a party pleads the general issue intending to give the special matter in evidence by virtue of an Act of Parliament, he must insert in the margin of his pleading the words "by statute," together with the year of the reign in which the Act of Parliament, on which he relies, was passed, and the chapter and section thereof, and whether such Act is public or otherwise, or the defence will be taken not to have been pleaded by virtue of any Act of Parliament. (c)

If the plaintiff's claim be only for a debt or liquidated demand, and the defendant does not within due time (see *ante*, p. 73) deliver a defence, the plaintiff may, at the expiration of such time, enter final judgment for the amount claimed and costs. (d) But if the claim be for detention of goods and pecuniary damages, or either of them, and the defendant makes default in delivering a defence, the plaintiff may enter interlocutory judgment against the defendant, and then issue a writ of inquiry to assess the value of the goods and the damages, or the damages only as the case may be, unless the court or a judge order such assessment to be ascertained in some other manner. (e)

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(a) Ord. 21, rr. 1, 3.

(b) Ord. 21, r. 8.

(c) Ord. 21, r. 19.

(d) Ord. 27, r. 2.

(e) Ord. 27, r. 4.

It will be remembered that if the defendant makes default in delivering a defence to the plaintiff's claim in an ordinary Chancery action, the plaintiff's proper course is to set the action down on motion for judgment (a) as stated *ante*, pp. 53, 73.

The practice where the defendant makes default in pleading to an action for the recovery of land, or for mesne profits, &c., has already been stated *ante*, pp. 150, 151.

#### COUNTER-CLAIM.

The practice with respect to counter-claims, stated *ante*, pp. 77 to 81, is the same in both the Queen's Bench and Chancery Divisions.

#### JOINDER BY DEFENDANT OF THIRD PERSONS AS PARTIES BY NOTICE.

The practice under this head, set out *ante*, pp. 81 to 83, applies also to the Queen's Bench Division.

We may add that it has recently been held that rules 48 and 52 of Order XVI. are confined strictly to cases where "contribution or indemnity is claimed." The words "or any other remedy or relief" contained in the rule of 1875, not being inserted in the rules of the present order. (b)

#### PAYMENT INTO COURT IN SATISFACTION OF THE PLAINTIFF'S CLAIM.

It has already been shown that payment of money into court in satisfaction of a debt or damages is not ordinarily applicable to the causes or matters assigned to the Chancery Division; and it has been held that the order which provides for such payment into court only applies to an action strictly brought to recover "a debt or damages" and does not apply to an action in which an account is claimed. (c) The practice

(a) Ord. 27, r. 11.

(b) *Pontifex v. Foord*, 12 Q. B. Div. 152; 49 L. T. Rep. N. S. 808; 32 W. R. 316.

(c) *Nichols v. Evans*, 22 Ch. Div. 611; 48 L. T. Rep. N. S. 66; 52 L. J. 383, Ch.; 31 W. R. 412.

as to payment into court under Order XXII. is, however, so far as it applies to the Chancery Division, briefly stated, *ante*, pp. 84, 86. And rules 1 to 9 of Order XXII., there detailed, are, in consequence of actions to recover debts and damages being usually brought in the Queen's Bench Division, especially applicable to such division. In the Queen's Bench Division a lodgment of funds to the account of the paymaster is to be made on presentation at the Bank of England (Law Courts Branch) of a request signed by or on behalf of the person desiring to make such lodgment. This request must specify the cause or matter, and the ledger credit to which the lodgment is to be placed, and the circumstances under which the money is lodged: thus whether the money is paid in in satisfaction, or paid in against the claim with a defence denying liability (see *ante*, pp. 84, 85), or paid in to a security for costs account (see *ante*, pp. 86, 109) it must be so stated in each case. And if money is lodged in pursuance of an order, it must be so stated, and the date of the order given, and the order or an office copy produced at the bank. If the lodgment is made on a notice or pleading, the notice or pleading must be produced at the bank, and the receipt for the lodgment is to be given thereon. (a)

If the defendant has lodged money in court under Order XIV., as a condition of liberty to defend (see *ante*, p. 54), and desires to appropriate the whole or part of such money to the whole or a specified part of the plaintiff's claim under rule 11 of Order XXII., such defendant or his solicitor must leave at the pay office a notice of such appropriation, specifying the title of the cause or matter, the ledger credit the date of the order and the amount to be appropriated, and whether so appropriated in satisfaction, or with a defence denying liability; he must also produce therewith the receipt of the bank for the money lodged. (b)

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(a) Funds Rules, 1884, r. 32.

(b) Funds Rules, 1884, r. 43.

If, in an action in this division, a sum of money has been recovered by an infant or person of unsound mind not so found by inquisition, the court or a judge may, at or after the trial, order that the whole or any part of such sum be paid into court to the credit of an account entitled in the action, to be subject to the order of the court or a judge. (a)

Money lodged in court in a cause or matter in the Queen's Bench Division, is not to be placed on deposit. (b) It will be remembered it is otherwise in the Chancery Division, as shown, *ante*, p. 89.

#### PAYMENT OUT OF COURT.

It has already been briefly shown (*ante*, p. 86) how money paid into court in the Chancery Division in an action for debt or damages, or to a security for costs account, is paid out of court. The practice there stated applies also to the Queen's Bench Division, but, as before remarked, an action to recover a debt or damages, is usually brought in this division; we will therefore now give at greater length the practice hereon.

Where money has been lodged in actions for debts or damages, or to a security for costs account, or under Order XIV. in the manner pointed out *ante*, p. 254, payment of the money is to be made to the person entitled thereto, or, on his written authority, to his solicitor, unless an order restraining such payment has been lodged at the pay office: (1) where the money is lodged or appropriated in satisfaction of the plaintiff's claim, the paymaster is to issue a direction for payment upon a request for payment. (2) If lodged or appropriated against a claim with a defence denying liability, the paymaster is to issue a direction for payment upon receipt of a request and a notification that the plaintiff accepts the sum lodged in satisfaction, and that due notice has been given of such acceptance. (3) If lodged

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(a) Ord. 22, r. 15.

| (b) Funds Rules, 1884, r. 77.

to a security for costs account, and the party lodging is, after the action is finally disposed of, entitled to have the money paid out to him, the taxing officer, on the taxation of costs, is to give to such party a certificate that he is so entitled, and upon such certificate being left at the pay-office with a request for payment, the paymaster is to issue a direction for payment. (4) When a request is made for payment of money lodged on a notice or pleading the original receipted notice or pleading must be produced at the pay-office. (a)

Except as above provided, money so lodged or appropriated can only be paid out in pursuance of an order; as where paid into court in pursuance of an order of the court or a judge, or certificate of a master or associate, except when paid in under the provisions of Order XIV., as detailed above. (b)

Where an order directs money to be paid out of court, a duly authenticated copy of the order must be left at the pay-office by or on behalf of the person entitled to payment, and is to be the paymaster's authority for the issue of a direction to give effect thereto. The direction (or cheque) is to be delivered upon the personal application of the person entitled thereto, unless he resides within the United Kingdom, in which case a request may be made for payment through the post of a sum not exceeding 500*l.*, as fully detailed, *ante*, p. 90. (c)

The paymaster's direction is a sufficient authority to the bank or other company to make the payment, and the payment thereby made is to be a good discharge to the paymaster, as shown, *ante*, p. 91. (d)

When money is, by an order in the Queen's Bench Division, directed to be paid to a person therein named, or, on his authority, to a solicitor or other person, the signature to the authority must be attested by a witness, whose

(a) Funds Rules, 1884, r. 44.

(b) Funds Rules, 1884, r. 44;  
Ord. 22, r. 11.

(c) Funds Rules, 1884, rr. 46, 48.

(d) Funds Rules, 1884, rr. 49, 50.

residence and description must be added to the attestation. (a)

As to payments to official persons, or married women, or to representatives of deceased persons, and as to deduction of legacy duty and income tax, see *ante*, pp. 91 to 93.

#### PAYMENT OR TRANSFER INTO COURT TO ABIDE THE EVENT.

The rules and practice stated *ante*, pp. 86 to 89, for the payment or transfer of funds into court, as also the practice observed for the "payment or transfer out of court," stated *ante*, pp. 90 to 93, has reference to the Chancery Division, except so far as stated to apply to the Queen's Bench Division, *ante*, pp. 255, 256, *et supra*.

#### WITHDRAWAL OF DEFENCE.

The practice as to withdrawal of the defence (see *ante*, p. 93), is the same in both the Queen's Bench and Chancery Divisions.

#### PLAINTIFF'S PROCEEDINGS AFTER DEFENCE.

The practice detailed under this head, *ante*, pp. 94 to 96, including "reply by the plaintiff, reply by persons other than the plaintiff," and "pleadings subsequent to reply," apply equally to the Queen's Bench Division as to the Chancery Division.

#### JOINDER OF ISSUE AND CLOSE OF THE PLEADINGS.

The practice herein stated *ante*, p. 97, is the same in both divisions.

#### DISCONTINUANCE.

The practice detailed under the head, *ante*, pp. 98, 99, applies also to the Queen's Bench Division.

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(a) Funds Rules, 1884, r. 51.

## MODES OF RAISING POINTS OF LAW.

The modes of raising points of law, stated *ante*, pp. 100 to 103, are the same in both the Queen's Bench and Chancery Divisions.

## DISCOVERY.

The practice as to discovery, detailed *ante*, pp. 104 to 113, applies also to the Queen's Bench Division, as does the practice under the head of "production and inspection," stated *ante*, pp. 113 to 116.

It may be stated that the question of privileged communications has been still further extended by the House of Lords; for when a party interrogated swears that he has no knowledge or information with regard to the facts interrogated as to, except such as he has derived from privileged communications made to him by his solicitors or their agents, he cannot be compelled to answer. (a)

## EVIDENCE.

The remarks made, *ante*, p. 117, under this title apply to an action pending in the Queen's Bench Division.

*Vivâ voce Evidence.*—We have shown (*ante*, pp. 117–126), that evidence in an action in the Chancery Division is either taken *vivâ voce* or by affidavit; or, as it is said, a cause is heard either with witnesses or without witnesses. In the Queen's Bench Division the evidence of witnesses in an action is usually given *vivâ voce* in open court. Rules 1 and 5 of Order XXXVII. are not, however, confined to actions in the Chancery Division, but apply also to actions in the Queen's Bench Division, and the solicitors of the parties may consent to the evidence being taken by affidavits, or the court or a judge may, for sufficient reason, order any particular facts to be proved by affidavit, or that the affidavit of any

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(a) *Lyell v. Kennedy*, 9 App. Cas. 81 (No. 2); 32 W. R. 497.

witness be read at the trial on such terms as may be imposed, or that the attendance of a witness in court should, for sufficient reason, be dispensed with, and he be examined on interrogatories or otherwise, as fully detailed *ante*, pp. 117 to 128. And under rule 5 of this order, the court or judge may, where it appears necessary for the purposes of justice, order the examination upon oath of a witness at any place, &c. It has been shown (*ante*, p. 118), that the examination of a witness under rules 1 and 5 of this order, (a) in any cause or matter in the Chancery Division *must* be taken before one of the examiners of the court, unless otherwise directed by the court or a judge; and such examination in a cause or matter in the Queen's Bench Division *may* be taken before one of such examiners, if the court or a judge so directs. (b) The examination may, however, be directed to be taken before the court or a judge, or an officer of the court, or any other person. (c)

In the Queen's Bench Division, if, for instance, a material witness, whom it was intended to call at the trial, was about to sail on a distant voyage, application was made at chambers, supported by an affidavit of the facts, for an order to have such witness examined on oath before a master of the court, or other person named in the order. A similar order might have been applied for if a material witness was so ill as to be unable to attend this trial. (d)

Under the new rules of Order XXXVII., such an examination as above may now be ordered to take place before an examiner of the court, or before a master or other person named in the order, according to the practice formerly prevailing in the Queen's Bench Division.

This division may also order a commission to issue for the examination of a witness or party abroad under the circumstances stated, *ante*, p. 119.

(a) Rules 39 to 50 of Order 37 were issued Feb. 4, 1884.

(b) Ord. 37, r. 39.

(c) Ord. 37, r. 5.

(d) Chit. Arch. Pr. 329, 331, 12th ed.



As to the terms upon which depositions can be given in evidence, see *ante*, pp. 122, 124.

The law and practice stated *ante*, Chap. XI. sect. 1, as to who may be witness, the mode of being sworn or making affirmation, how compelled to attend at the trial to give evidence, and other points (with the exceptions above mentioned), apply also to proceedings in actions commenced in the Queen's Bench Division.

*Affidavit evidence.*—As above stated, it is not usual in an action in this division to consent that evidence at the trial be given by affidavit; but by order of the court or a judge affidavits may, as just shown, be read at the trial; and an affidavit made in answer to interrogatories may be so read, as detailed *ante*, p. 126. And upon the hearing of any motion in court, or of a summons at chambers, evidence may be given by affidavit (*ante*, p. 127). And the rules of practice stated *ante*, p. 127, as to the title of the affidavit, the mode in which it is drawn up, &c., apply to an affidavit made in a cause or matter in the Queen's Bench Division, as do the rules of practice detailed *ante*, pp. 128, 129, as to the facts sworn to, the jurat, interlineations, exhibits, the persons before whom an affidavit may be sworn, and as to illiterate or blind deponents. An affidavit in this division may be also sworn to either in print or manuscript, as stated *ante*, p. 130, and must be filed as there pointed out. The times mentioned (*ante*, p. 130) for filing affidavits only apply when the evidence is taken by affidavit at the hearing, and therefore will not ordinarily apply to proceedings in an action in the Queen's Bench Division.

*Documentary evidence.*—The practice stated *ante*, pp. 132, 133, as to documentary evidence applies also to proceedings in the Queen's Bench Division, except that as it is not the practice in this division to take the evidence at the trial by affidavit, the remarks made at pp. 133, 134, as proving documents as exhibits at the hearing will not ordinarily apply to evidence in actions in this division.

## NOTICE AND ENTRY OF TRIAL.

The practice detailed *ante*, pp. 136 to 138, as to notice and entry of trial, applies also to actions proceeding in the Queen's Bench Division. And in this division the notice of trial must, in addition to stating whether it is for the trial of the cause or matter, or of issues therein, also state the place and day for which it is to be entered for trial. (*a*,

When trials are entered with a district registrar (see *ante*, p. 137) it is his duty to make out two lists for trials with juries and trials without juries, respectively. And when the lists are closed he must send a copy thereof, with the copies of the pleadings left with him (see *ante*, p. 137), to the associate at the assize town so as to be received by him before the opening of the commission. (*b*)

In London and Middlesex, in this division, trials are entered with the associate, whose duty it is to make out the list. (*c*) In the Chancery Division it will be remembered trials are entered with the Chancery registrars.

When a trial, which has been entered in a district registry, has been postponed or withdrawn (see *ante*, p. 138) notice thereof must immediately be given by the party entering it to the district registrar, who will thereupon expunge such entry from his list. (*d*)

*Short causes.*—The practice under this head (*ante*, p. 138), is confined to actions in the Chancery Division.

## THE TRIAL.

It will be remembered that causes or matters assigned to the Chancery Division are to be heard by a judge without a jury, unless otherwise ordered; it has also been stated in what causes or matters the court or a judge must order a trial with a jury if applied for, and in what causes or matters he

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(*a*) Ord. 36, r. 13.  
(*b*) Ord. 36, rr. 24, 26.

(*c*) Ord. 36, r. 29.  
(*d*) Ord. 36, r. 25.

may so order the trial to be by a judge and jury, or by a judge with assessors, &c.(a)

Further, in actions of slander, libel, false imprisonment, seduction, or breach of promise of marriage, the plaintiff may, in his notice of trial, or the defendant may, by a notice to be given within four days from the time of the service of notice of trial, or within such extended time as the court or a judge may allow, or in a notice of trial to be given by him, upon the plaintiff's default in giving such notice, signify a desire to have the issues of fact tried by a judge with a jury, then the same must be so tried. (b)

Different questions of fact arising in an action in the Queen's Bench Division may be ordered to be tried by different modes, &c., as stated, *ante*, p. 140.

Notice of trial having been given and the cause entered, the action will come on for trial in its order (which may be ascertained from the associates' cause list) before one of the judges of the Queen's Bench Division, either with or without a jury, according to the notice of trial, subject to any order as to the mode of trial made by the court or a judge, either at the sittings in London or Middlesex, or at the assizes, as the case may be. In the Chancery Division it will be remembered the hearing takes place before the judge to whom the cause or matter has been assigned, as stated *ante*, p. 140.

There is no local venue for the trial of any action, except where otherwise provided by statute, and the action is to be tried in the county or place named in the statement of ~~claim~~ or notice; and where no place of trial is named the trial will take place in Middlesex, unless otherwise ordered, as fully detailed *ante*, pp. 68, 140.

The practice stated *ante*, pp. 140, 141, as to the effect of a plaintiff or defendant neglecting to appear at the trial applies to actions in the Queen's Bench Division.

(a) See Ord. 36, rr. 3—7; *et* *ante*, p. 139.

(b) Ord. 36. rr. 2, 12.

The rules given (*ante*, p. 141), as to the addresses of counsel, where the action is tried by a judge without a jury, will apply to a trial in the Queen's Bench Division when such trial is without a jury.

Upon a trial with a jury the address to the jury is to be regulated as follows: The party who begins, or his counsel, is to be allowed, at the close of his case, if his opponent does not announce any intention to adduce evidence, to address the jury a second time for the purpose of summing up the evidence, and the opposite party, or his counsel, is to be allowed to open his case, and also to sum up the evidence, if any; and the right to reply is to be the same as heretofore. (*a*)

In actions for libel or slander, in which the defendant does not, by his defence, assert the truth of the statement complained of, he cannot on the trial give evidence in chief, with a view to mitigation of damages, as to the circumstances under which the libel or slander was published, or as to the character of the plaintiff, without leave of the judge, unless seven days at least before the trial he furnishes particulars to the plaintiff of the matters as to which he intends to give evidence. (*b*)

The judge may postpone or adjourn the trial, or direct judgment to be entered, or leave any party to move for judgment, or he may try the cause with the assistance of assessors, or refer it to a referee. (*c*)

In the Rules of the Supreme Court, 1883, there is no mention of a judgment of nonsuit as in the Rules, 1875; but as Order LXXII., r. 2, provides "that where no other provision is made by the Judicature Acts or these rules, the present procedure and practice remain in force," a judgment of nonsuit may still be given (see also 38 & 39 Vict. c. 77, s. 17).

Upon a trial at the assizes, or at the sittings of the

(*a*) Ord. 36, r. 36, and as to the previous practice, see Arch. Pr. by Prentice, 357, 370, 13th ed.

(*b*) Ord. 36, r. 37.

(*c*) See Ord. 36, rr. 7, 34, 39, 43; and fully, *ante*, p. 142.

Queen's Bench Division for London and Middlesex, if the officer present at the trial is not the one by whom judgments ought to be entered, the associate or master must enter all such findings of fact, and such other directions as the judge may direct to be entered, in the book to be kept for such purpose. (a)

We have already shown what questions, arising in a cause or matter, may be referred by the court or a judge for inquiry and report to an official or special referee, and the practice thereon is fully detailed *ante*, pp. 142 to 146.

#### REFERENCE TO ARBITRATION.

The previous practice as to arbitration is unaffected by the provisions of the Judicature Acts and Rules thereunder as to referees. (b) We will therefore here briefly state the practice hereon, as hitherto matters have been more usually referred to arbitration from the Queen's Bench Division than from the Chancery Division.

By the 17 & 18 Vict. c. 125, power is given to the court or a judge at any time after writ issued, on the application of either party, to refer to an arbitrator appointed by the parties, or to an officer of the court, all matters in dispute which consist wholly or in part of matters of mere account which cannot conveniently be tried in the ordinary way, on such terms as the court or judge may think reasonable; and the award or certificate of the arbitrator is enforced by the same process as the finding of a jury. (c)

So the parties may, by agreement of reference, submit any question to the decision of an arbitrator. And where such agreement is in writing, and any of the parties thereto nevertheless commence an action in regard to any of the matters agreed to be referred, the court or a judge may, on the application of the defendant at any time after appearance

(a) Ord. 36, r. 41.

(b) *Cruikshank v. Floating  
Baths Company*, 1 C. P. Div. 260;  
34 L. T. Rep. N. S. 733; 45

L. J. 684, C. P.; 24 W. R. 644; Ord.  
36, r. 10.

(c) Sect. 3; *Martin, v. Fife*, 50  
L. T. Rep. N. S. 72, C. A.

and before delivering a defence, if there is no reason why the matters should not be referred, and the defendant is still willing to refer the matters, order all proceedings in the action to be stayed. (a)

Upon the trial of any issue of fact by a judge under the 17 & 18 Vict. c. 125, he may order matters of account which cannot conveniently be tried before him to be referred to an arbitrator, &c., as in sect. 3. (b)

It was held, on the construction of this section, that it only applied where the judge was sitting at *Nisi Prius* without a jury under sect. 1 of the Act. And it was also held that the application under sect. 3 must be made anterior to the trial, and that a judge at a trial with a jury had no power to refer a matter compulsorily. (c)

The arbitrator may, in any case when the submission is or may be made an order of court, and it is not provided to the contrary, state his award in the form of a special case for the opinion of the court, and when an action is referred, judgment, if so ordered, may be entered according to the opinion of the court. (d)

The proceedings under any such arbitration as aforesaid are, unless otherwise provided, to be conducted in like manner and subject to the same rules and enactments as to the power of the arbitrator and of the court, the attendance of witnesses, the production of documents, &c., as upon a reference made by consent under an order of the court or judge. (e)

The attendances of witnesses before an arbitrator, or the production of documents, is usually compelled by an order of the court or a judge. (f)

The court or judge has full power to remit the matters referred to the reconsideration of the arbitrator, upon such terms as to costs or otherwise as may be proper. (g)

(a) 17 & 18 Vict. c. 125, s. 11.

(b) 17 & 18 Vict. c. 125, s. 6.

(c) *Robson v. Lees*, 30 L. J. 235, Ex.; 4 L. T. Rep. N. S. 516.

(d) 17 & 18 Vict. c. 125, s. 5.

(e) 17 & 18 Vict. c. 125, s. 7.

(f) See 3 & 4 Will. 4, c. 42, s. 40.

(g) 17 & 14 Vict. c. 125, s. 8.

If the document of reference provides that the reference shall be to a single arbitrator, and all the parties do not concur in the appointment of an arbitrator, or if the arbitrator appointed refuses to act, or becomes incapable, or dies, and such document does not show that it was intended that the vacancy should not be supplied, and the parties do not concur in appointing a new one; or if where the parties or two arbitrators may appoint an umpire, they fail to do so; or if an umpire refuses to act, becomes incapable, or dies, and the document of reference does not show that it was intended that such vacancy should not be supplied, and no new appointment is made, then in every such case any party may serve the other parties or arbitrators with a written notice to appoint an arbitrator or umpire, and if within seven clear days after service of the notice no arbitrator or umpire is appointed, a judge may, upon summons taken out by the party giving the notice, appoint an arbitrator or umpire with power to act in the reference as if appointed by consent of all parties. (a)

When the reference is to two arbitrators, and there is nothing in the submission of reference to the contrary, or if it does not make provision for the appointment of an umpire, the two arbitrators may appoint an umpire within the period allowed for making an award, unless they are called upon by notice, as above detailed, to make the appointment sooner. (b)

The arbitrator acting under any document or compulsory order of reference as aforesaid, or under any order referring the award back, must make his award under his hand within three months after he has been appointed, and has entered on the reference, or been called upon to act by written notice, unless such document or order of reference contains a different limit of time. This time may be enlarged by the written

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(a) 17 & 18 Vict. c. 125, s. 12; |  
see also sect. 13.

(b) 17 & 18 Vict. c. 125, s. 14.

consent of the parties, or by an order of the court of which the submission or order may be made a rule or order of court or of a judge thereof. And if no other period is named for such enlargement, it is to be deemed to be for one month. (a)

Where a compulsory reference to arbitration has been ordered, any party thereto may appeal from the award upon any question of law to a divisional court; and the court may set aside such award on any ground on which it may set aside the verdict of a jury, or remit all, or any part of the matter in dispute to the arbitrator, or make any order thereon which may be just. (b)

An award may be set aside for corrupt or partial conduct on the part of the arbitrator; or on the ground that the arbitrator has exceeded his authority, or has not pursued the submission; or on the ground that the award is not final. (c)

Before moving to set aside an award the agreement of reference must be made a rule of court.

The rule or order made on a motion to set aside, remit, or enforce an award is now absolute in the first instance. (d)

No order to make a submission to arbitration, or an award an order of the court can be passed until the original submission or award has been filed in the Central Office, or if the proceedings are taken in a district registry, in the district registry, and a note thereof made on the order by the proper officer. Office copies thereof may be procured (e)

An application to set aside an award may be made at any time before the last day of the sittings next after such award has been made and published to the parties. (f)

By the 17 & 18 Vict. c. 125, the award or certificate of the referee on a compulsory reference thereunder may be enforced by the same process as the finding of a jury upon the matter

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(a) 17 & 18 Vict. c. 125, s. 15.

(b) Ord. 59, r. 3.

(c) Chit. Arch. 1662, &c., 12th ed.

(d) Ord. 52, r. 2.

(e) Ord. 61, rr. 15, 31.

(f) Ord. 64, r. 14.



referred (sect. 3); at any time after seven days from the time of publication, by authority of a judge on such terms as he may think reasonable, notwithstanding the time for moving to set it aside has not elapsed: (sect. 10.)

In other cases, after the submission is made a rule or order of court the award may be enforced by attachment, or if it is for the payment of money also by execution. Before an attachment or execution can issue a copy of the rule or order and award, and the master's allocatur for costs, must be served, and the originals, if possible, shown, and a demand of compliance made. (a)

If the submission cannot be made a rule or order of court the award must be enforced by action. (b)

Costs may be taxed on an award, notwithstanding the time for setting aside the award has not elapsed. (c)

#### NEW TRIAL.

We have already (*ante*, pp. 147 to 149), distinguished between moving for a new trial when a cause is tried by a judge and jury, and when tried by a judge alone.

#### JUDGMENT.

For the definition of a judgment see *ante*, p. 150.

A judgment in the Queen's Bench Division is either interlocutory or final. An interlocutory judgment, as already shown, does not terminate the action. In this division, if the demand sued for be unliquidated damages, and the defendant suffers judgment by default, or on confession of the plaintiff's claim, the judgment given is interlocutory, because the court knows not what amount of damages the plaintiff has sustained. Such damages must be ascertained on a writ of inquiry heard before the sheriff, or if they are substantially a matter of calculation, by a master, or by an

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(a) Chit. Arch. 1692, &c., 12th ed; and as to execution generally, see *ante*, p. 159 *et seq.*

(b) Chit. Arch. *sup.*

(c) Ord. 65, r. 15.

officer of the court on an order of reference for such purpose. (a)

A writ of inquiry is directed to the sheriff of the proper county, and commands him to summon a jury to inquire into the damages. The sheriff in the execution of this writ acts by deputy. The usual notice of trial (see *ante*, p. 136) must be given, witnesses are summoned, and the trial takes place before the sheriff's deputy in the usual manner. When the damages are assessed the inquisition is returned to the court above and sealed, and when the costs are taxed final judgment is entered for the amount of damages and costs. (b)

Where the inquiry is before a master or officer of the court the attendance of witnesses and the production of documents before him may be compelled by subpoena, and such officer must indorse on the order of reference the amount of damages found by him, and deliver the order with such indorsement to the party entitled to such damages, and costs are then taxed and final judgment entered. (c) The master's certificate of damages must be sealed and filed in the Central Office when judgment is entered. (d)

As to judgment in an action for the recovery of land, see *ante*, pp. 53, 150.

As to judgment on a counter-claim, see *ante*, p. 81.

As to judgment on discontinuance, see *ante*, p. 98.

As to judgment on confession, see *ante*, pp. 151.

As to judgment by default at the hearing, see *ante*, pp. 140, 141.

As to judgment on a plea in lieu of demurrer, or on a special case, see *ante*, pp. 100, 102.

At or after the trial the judge may order judgment to be entered for either party. No judgment can be entered after the trial, however, without the order of the court or a judge. (e)

(a) See Ord. 13, rr. 5, 6; Ord. 27, rr. 4, 5, 6; Ord. 36, rr. 56, 57; Ord. 41, r. 7.

(b) See Ord. 36, r. 56; Ord. 41, r. 7; Chit. Arch. 996, 12th ed.

(c) Ord. 36, r. 57.

(d) Ord. 41, rr. 7, 8.

(e) *Ante*, p. 151.

Except where it is by the Procedure Acts or Rules of Court provided that judgment may be obtained in some other manner, the judgment of the court is to be obtained by motion for judgment. (a)

Where at the trial the judge or referee abstains from directing any judgment to be entered, the plaintiff may set down a motion for judgment; and if he does not do so and give notice thereof to the other parties within ten days after the trial, any defendant may set down a motion for judgment and give notice thereof to the other parties. (b)

A judge cannot be said to have abstained from giving judgment unless he has been asked to give judgment at the trial. (c)

Where, at or after a trial by a judge, he has directed that judgment be entered, any party may apply to set aside such judgment, and to enter any other judgment, on the ground that, upon the finding as entered, the judgment so directed is wrong. (d)

The application to so set aside the judgment must be made to the Court of Appeal; but if it is coupled with a motion for a new trial, where there has been a trial with a jury, the application must be to a divisional court. (e)

As stated *ante*, p. 144, a referee has now the same power to direct that judgment be entered for any or either party as a judge of the High Court. (f) And where at a trial by a referee he has directed that the judgment be entered, any party may move to set it aside and to enter any other judgment on the ground that upon the finding as entered the judgment is wrong. (g)

Where issues or questions of fact have been ordered to be tried or determined in any manner, the plaintiff may set down a motion for judgment as soon as they have been

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(a) Ord. 40, r. 1.

(b) Ord. 40, r. 2.

(c) *Davenport v. Ward*, 47 L. T. Rep. N. S. 348.

(d) Ord. 40, r. 4.

(e) Ord. 40, r. 5.

(f) Ord. 36, r. 50.

(g) Ord. 40, r. 6.

determined; and if he does not do so and give notice thereof to the other parties within ten days after this right arose, the defendant may set down a motion for judgment, and give notice thereof to the other parties. (a)

Where issues or questions of fact are so ordered to be tried or determined, and some only of them have been tried or determined, any party who considers that the result of such trial or determination renders the trial or determination of the others unnecessary, or desirable that the trial or determination thereof should be postponed, may apply to the court or a judge for leave to set down a motion for judgment without waiting for such trial or determination; and such leave may be given, if it appears expedient, and terms may be imposed, and directions also given, for postponing the trial of the other issues of fact. (b)

There must be two clear days between the service of a notice of motion and the day named for hearing, unless the court or a judge gives special leave to the contrary. (c)

Where leave to serve short notice of motion is asked for, this must be clearly stated to the court; and the notice served in accordance with leave given must also distinctly state that fact. (d)

No motion for judgment can be set down after the expiration of one year from the time when the party seeking to set down the same first became entitled to do so, without leave of the court or a judge. (e)

Upon a motion for judgment the court may draw all inferences of fact not inconsistent with the finding of the jury, and if it has all the materials before it for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment; or, if it has not sufficient materials before it to enable it to give judgment,

(a) Ord. 40, r. 7.

(b) Ord. 40, r. 8.

(c) Ord. 52, r. 5.

(d) *Dawson v. Besson*, 22 Ch.

Div. 505; 31 W. R. 537; 48 L. T. Rep. N. S. 407; 52 L. J. 563, Ch.

(e) Ord. 40, r. 9.

direct the motion to stand over for further consideration, and direct such issues or questions to be tried or determined, or such accounts and inquiries be taken and made as are necessary. (a)

We have shown, *ante*, pp. 154, 155, that judgments and orders made in the Chancery Division are drawn up by the registrars. We have also shown (*ante*, p. 263), that at a trial at the assizes, or at the sittings of the Queen's Bench Division for London and Middlesex the proper judgment officer, or, in his absence, the associate or master, must enter the findings of fact and such other directions which the judge may direct to be entered in the proper book.

If the judge directs that judgment be entered for any party absolutely, the certificate of the associate or master to that effect is to be a sufficient authority to the proper officer to enter judgment accordingly. (b)

Every judgment must be entered by the proper officer in a book kept for such purpose; and the party entering the judgment must leave with the officer a copy of the whole of the pleadings in the cause, other than any petition or summons, which must be in print, except where the originals are permitted to be written. (c)

All judgments in the Queen's Bench Division, if entered in London, are to be entered in the Central Office. (d)

If a defendant has appeared in a cause or matter by a solicitor, an order by consent for entering judgment can only be given by such solicitor or agent. And where the defendant has not appeared or has appeared in person, no such order is to be made unless the defendant attends before a judge and gives his consent in person, or unless the consent is in writing and attested by a solicitor acting for him; except when he is a barrister, conveyancer, special pleader, or solicitor. (e)

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(a) Ord. 40, r. 10.

(b) Ord. 36, r. 42.

(c) Ord. 41, r. 1.

(d) Ord. 41, r. 2.

(e) Ord. 41, rr. 9, 10.

Enrolment of a judgment or order is no longer necessary. (a)

As to the time from which a judgment or order takes effect, see *ante*, pp. 156, 174.

As to correcting errors in judgments, see *ante*, p. 156.

As to serving notice of a judgment or order, see *ante*, pp. 20, 157.

As to a judgment on condition, see *ante*, pp. 157, 159.

#### ENFORCEMENT OF JUDGMENTS.

The practice hereon detailed *ante*, pp. 159 to 170, applies also to the enforcement of judgments entered in the Queen's Bench Division. The effect of Debtor's Act, 1869, as to arrest and imprisonment for debt, was, however, accidentally omitted when previously treating of the enforcement of judgments. We now append it.

By the 32 & 33 Vict. c. 62, s. 4, it is enacted that no person shall be arrested or imprisoned for making default in payment of a sum of money, except—

- (1) Such as are in the nature of a penalty not arising out of contract:
  - (2) Sums recoverable summarily before a justice of the peace:
  - (3) Sums due from trustees, &c., ordered to be paid by any court of equity:
  - (4) Costs or money ordered by the court to be paid by solicitors as such: (b)
  - (5) Sums ordered by the Court of Bankruptcy to be set aside by debtors out of their salaries or incomes for the payment of creditors:
  - (6) Sums ordered to be paid under section 5 of this Act.
- And even in the above cases the imprisonment is not to continue beyond a year.

(a) Ord. 61, r. 8.

(b) A discretion is given to the

court in cases numbered 3 and 4:  
(41 & 42 Vict. c. 54.)

A power to commit, however, is still given by sect. 5, which allows any court to commit to prison for a period not exceeding six weeks, or until payment of the sum due, any person making default in payment of any debt or instalment of a debt due from him in pursuance of any order or judgment; provided it is proved to the satisfaction of the court that the person making default has, or has had since the date of the order or judgment, the means to pay the sum in respect of which he has made default. The jurisdiction given by this act may be exercised by a judge at chambers.

It is further provided that imprisonment under this section is not to operate as a satisfaction.

#### INTERLOCUTORY APPLICATIONS.

*Motions.*—When by the rules of court any application is authorised to be made to the court or a judge, such application, if made to a divisional court or to a judge in court, must be made by motion. (a)

Orders obtained on motion in the Queen's Bench Division are either common or special. The former are obtained by counsel simply signing the motion paper; the latter are only granted after being brought before the court by counsel, and should be supported by proper evidence. (b)

No motion or application for a rule *nisi* or order to show cause can now be made in any action; or to set aside, remit, or enforce an award; or for attachment, or to answer the matters in an affidavit; or to strike off the rolls; or against a sheriff to pay money levied under an execution. (c)

Certain motions require notice to be given to the parties against whom they are made; in other cases they are made *ex parte*. A motion is ordinarily only allowed to be made *ex parte* where the rules of court or some statute so provide, or the court is satisfied that the delay of proceeding

(a) Ord. 52, r. 1.

(b) Chit. Arch. 1252, 1268, 13th ed.

(c) Ord. 52, r. 2.

in the ordinary way would or might cause irreparable or serious mischief, as where it is for an injunction to restrain a threatened injury. (a)

As to the practice with respect to a notice of motion, see *ante*, pp. 172, 173.

As to the hearing of motions and evidence thereon, see *ante*, p. 173.

If the application is granted the order is drawn up by one of the clerks in the summons and order department at the Central Office. It will be remembered, in the Chancery Division, the order is drawn up by one of the registrars of that division, as stated *ante*, p. 173.

As to what orders need not be drawn up, and from what date an order when drawn up takes effect, see *ante*, pp. 173, 174.

As to a motion for an injunction, see *ante*, pp. 175 to 177.

As to a motion for a *mandamus* in an action, see *ante*, pp. 177, 178. As there stated the prerogative writ of *mandamus* can only be granted by the Queen's Bench Division, according to the practice heretofore in use. (b)

As to an application for a receiver, see *ante*, p. 179.

As to an application for the preservation and inspection of property pending litigation, see *ante*, p. 183. An inspection of this nature may be had by a judge trying a cause with or without a jury, or the inspection may be by the jury (c)

The court or a judge may also, on the application of any party, make an order for the sale by any person, and in such manner and on such terms as may be desirable, of any goods or merchandise of a perishable nature or likely to injure from keeping, or which it may be otherwise desirable to have sold at once. (d)

*Petitions*.—It is not the practice to apply to the Queen's Bench Division by petition.

(a) See Ord. 52, r. 3; 36 & 37  
 Vict. c. 66, s. 25, sub-s. 8.  
 (b) Ord. 53, r. 5.

(c) Ord. 50, rr. 4, 5.  
 (d) Ord. 50, r. 2.



*Summons at chambers.*—The practice as to obtaining interlocutory orders at the chambers of judges of the Chancery Division is stated *ante*, pp. 188, 189. In the Queen's Bench Division the summons is heard either before one of the judges of that division or before one of the masters of the Supreme Court. We have shown (*ante*, p. 246) that in this division every action not proceeding in a district registry is to be assigned to one of the masters, and documents, &c., therein are to be marked with his name, and such applications thereon as can be heard by a master are to be heard by him, &c.

Six of the masters selected according to rota attend as masters at chambers in the Queen's Bench Division during each of the four sittings of the offices in each year. (*a*)

In the Queen's Bench Division a master may transact all such business and exercise all such authority and jurisdiction in respect of the same, as under the Judicature Acts or Rules of Court may be transacted or exercised by a judge at chambers, except the matters or proceedings following, (*b*) which are all matters relating to criminal proceedings or to the liberty of the subject; granting leave for service out of the jurisdiction of a writ of summons or of notice of the writ; the transfer of actions from one division or judge to another; the settlement of issues except by consent; inspection and other orders under Order L., rr. 1 to 5; appeals from district registrars; prohibitions; injunctions and other orders under sect. 25, sub-sect. 8, of the Judicature Act, 1873; (*b*) awarding costs, other than costs of proceedings before a master or registrar, or costs he is authorised to award; reviewing the taxation of costs; charging orders absolute; acknowledgments of married women. (*c*)

Every application at chambers not made *ex parte* is to be made by summons. It must be addressed to all the persons

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(*a*) See Ord. 54, rr. 13, 14.

(*b*) See *ante*, pp. 174, 183, 275.

(*c*) Ord. 54, r. 12.

on whom it is to be served. It must be sealed by the proper officer when issued, and cannot then be altered except upon application at chambers. (a)

An originating summons is to be prepared by the applicant or his solicitor, and must be sealed in the Central Office, and marked as aforesaid, and is then deemed to be issued. A copy of the summons must be left at the Central Office, and filed there, and stamped. (b)

An originating summons must be duly indorsed with an address for service, as in the case of a writ of summons, (c) as to which see *ante*, p. 37.

A summons issued for the purpose of obtaining some interlocutory order must be served two clear days before the return thereof, unless otherwise ordered. An originating summons, where service is necessary, must be served seven clear days before the return thereof. (d)

The summons is served in the same manner as a notice, by being left within the prescribed hours (see *ante*, p. 63) at the address for service of the person to be served, and with any person resident at or belonging to such place. (e) But it would appear that putting the summons in a letter box there is not good service within this order. (f)

Every application to a master at chambers must, at the time of hearing, be marked by such master with his name (unless already marked with the name of some other master), and the cause or matter in which such application has been so marked is thereupon to become assigned to such master. (g)

The master may refer any matter to a judge which appears proper for his decision, and the judge may either dispose of it or refer it back to the master with such directions as he may think fit. (h)

(a) Ord. 54, rr. 1, 3, 10.  
(b) Ord. 5, rr. 6, 8; Ord. 54,  
rr. 11, 17.  
(c) Ord. 4, r. 4.  
(d) Ord. 54, r. 4.

(e) Ord. 67, r. 2.  
(f) *Jiminez v. Owen*, W. N.  
1883, p. 232.  
(g) Ord. 54, r. 17.  
(h) Ord. 54, r. 20.

Any person affected by any order or a decision of a master may appeal therefrom to a judge at chambers. Such appeal is to be by way of indorsement on the summons by the master at the request of any party, or by notice in writing to attend before the judge, without a fresh summons, within four days after the decision complained of, or such further time as may be allowed by a judge or master. This appeal is no stay of proceedings unless so ordered by a judge or master. (a)

Upon the return of the summons, if any party fails to attend, the judge may proceed *ex parte* without any affidavit of non-attendance; but the judge may require evidence of service, which is usually by affidavit. Or if the judge does not think fit to proceed *ex parte*, he may order a reasonable sum for costs to be paid to the party attending by the absent party, or by his solicitor personally. (b)

In the Queen's Bench Division the appeal from a decision of a judge at chambers is to a divisional court. (c)

In this division every appeal to the court from any decision at chambers is to be by motion and made within eight days after the decision appealed against, or if such court does not sit within such eight days, then on the first day on which any such court may be sitting after the expiration of such eight days. (d)

Where an order has been made not embodying any special terms or directions, but simply enlarging time for taking any proceeding or doing any act, or giving leave for the amendment of any writ or pleadings, or for the filing of any document, &c., the order need not be drawn up unless the court or a judge otherwise directs; and a note or memorandum of such order signed by the judge or master, is sufficient authority for such enlargement, amendment, &c., (e) as fully detailed *ante*, p. 174.

(a) Ord. 54, rr. 21, 22.

(b) Ord. 54, rr. 5, 7.

(c) Ord. 54, r. 23.

(d) Ord. 54, r. 24.

(e) Ord. 52, r. 14.

Where an order is drawn up it must be sealed, and marked with the name of the judge or master by whom it is made. (a)

Lists of summons (not being for time only) are made out by the proper officer, distinguishing those which a master has jurisdiction to hear from those which he has not jurisdiction to hear, and those which are to be attended by counsel from those which are not to be so attended. (b)

If, after a summons is called over a second time, neither party appear, it is struck out. (c)

Amongst the applications that may be made to the Chancery Division is that for a writ of *ne exeat regno*, to prevent a defendant quitting the kingdom for the purpose of evading the plaintiff's equitable claim (see *ante*, p. 181). In the Queen's Bench Division an order for a defendant's arrest may also be made.

By the Debtors Act, 1869 (32 & 33 Vict. c. 62, s. 4), imprisonment for debt is abolished, with certain exceptions. (d) Yet by sect. 6, where the plaintiff in any action in the High Court in which, if brought before the commencement of this Act, the defendant would have been liable to arrest, proves, to the satisfaction of a judge, that he has good cause of action against the defendant to the amount of 50*l.* or upwards, and that there is probable cause for believing that the defendant is about to quit England unless apprehended, and that the defendant's absence will materially prejudice the plaintiff in the prosecution of such action, such judge may order the defendant to be arrested and imprisoned for any period not exceeding six months, unless he has sooner given the security prescribed, not exceeding the amount claimed in the action, not to go out of England without leave of the court. If the action is for a penalty other than a penalty in respect of a contract, it is not necessary to show that the absence of defendant will

(a) Ord. 54, r. 29.

(b) Ord. 54, r. 27.

(c) Ord. 54, r. 28.

(d) See *ante*, p. 273.

materially prejudice the plaintiff, and the security given is to the effect that any sum recovered against the defendant in the action shall be paid, or that he be rendered to prison.

All summonses under the Debtors Act, 1869, are to be heard in the first instance, if issuing out of the Central Office before a master, and if issuing out of a district registry before the district registrar, who are respectively to have power to make any order as to payment by instalments; but if it appears to him to be a case for committal he must adjourn the summons to be heard before the judge. (a)

The application is *ex parte* upon an affidavit of the facts. The order duly indorsed is delivered to the sheriff by whom the arrest will be made. The defendant may apply to the court or a judge to rescind or vary the order, or to be discharged from custody. (b) The application should be supported by affidavits contradicting those used by the plaintiff on obtaining the order. (c)

And upon payment into court of the amount mentioned in the order, or upon giving the bond or other security ordered, a receipt is to be given, the latter signed by the plaintiff's solicitor, and upon delivery thereof to the sheriff the defendant is entitled to be discharged out of custody. (d)

The defendant cannot be kept in prison after final judgment. (e)

The following persons are privileged from arrest on civil process:—The royal family and their officers and domestics; peers and peeresses; foreign ambassadors and their domestics; the judges, &c. The following enjoy a temporary privilege: Members of Parliament during the session and forty days before and after it; parties, counsel, solicitors and witnesses in the cause, whilst going to, attending at, and returning from court; a clergyman whilst performing,

(a) Ord. 54, r. 19.

(b) Ord. 69, rr. 1, 2.

(c) Chit. Arch. 698, 13th ed.

(d) Ord. 69, rr. 3, 4, 6.

(e) *Hume v. Druryff*, 8 Ex. 214.

or going to or returning from performing, divine service, &c. (a)

As to application at chambers for an interpleader see *ante*, pp. 190, 191.

#### APPEAL.

As to the constitution of the Court of Appeal see *ante*, pp. 12, 13.

We have shown that orders made in the Chancery chambers may be discharged in court by the judge sitting in court (see *ante*, p. 193); also that in the Queen's Bench Division an appeal lies from a decision of a master to a judge at chambers, and from a decision of a judge at chambers an appeal lies to a divisional court (see *ante*, p. 278). As to the constitution and jurisdiction of a divisional court see *ante*, p. 244.

Subject to the above remarks the practice as to appeal, stated *ante*, pp. 192 to 201, applies to appeals from the Queen's Bench Division.

#### PROCEEDINGS IN DISTRICT REGISTRIES.

The practice hereon, detailed *ante*, pp. 202 to 205, applies to the Queen's Bench Division, except that as actions are not assigned to particular judges in this division, references by a district registrar to a judge, and appeals from his decisions to a judge (see *ante*, pp. 204, 205), may be heard by any judge of the Queen's Bench Division. The paragraphs at p. 204, as to filing certificates of the chief clerks and taxing officers, and as to the trial of the action also apply only to causes or matters in the Chancery Division.

#### TRANSFER OF ACTIONS.

1. *From one Division to another.*—On this point the reader is referred *ante*, pp. 206, 207.

2. *From one Judge of the Chancery Division to another.*—

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(a) Chit. Arch. 648, &c., 12th ed.

The remarks under this head (*ante*, p. 207) apply exclusively to the Chancery Division.

3. *From and to District Registries.*—The practice hereon (*ante*, pp. 208 to 210) is the same in both the Chancery and Queen's Bench Divisions.

4. *From and to County Courts.*—The remarks made hereon (*ante*, pp. 210, 211, chiefly apply to removals from and to the Chancery Division.

In other cases: a plaint entered in the County Court may be removed therefrom into the High Court, if the debt or damage claimed exceeds 5*l.*, by leave of a judge of the High Court, if it appears a case fit to be tried in the High Court, and upon such terms as to costs, giving security, or otherwise as such judge may think proper. (a)

And if the amount claimed be under 5*l.* the plaint may be removed from the County Court to the High Court by writ of *certiorari* if such court, or a judge thereof, thinks fit, and if the party applying for the writ gives security, to be approved by one of the masters of the Supreme Court, for the amount of the claim and costs, not exceeding 100*l.* (b)

The writ should be served on the judge or registrar. (c)

And where a claim in contract exceeding 20*l.*, or a claim in tort exceeding 5*l.*, is entered in the County Court the defendant may give notice that he objects to the action being tried in the County Court, and on his giving security, to be approved of by the registrar, not exceeding 150*l.*, the action may be removed into the High Court. (d)

Also, where, in an action in the County Court, the defence or counter-claim involves matters beyond the jurisdiction of that court, the High Court, or any division or judge thereof, may, on the application of any party, order the transfer of the proceeding into the High Court, or any division thereof.

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(a) 9 & 10 Vict. c. 95, s. 90.

(b) 19 & 20 Vict. c. 108, s. 38.

(c) Pollock, C. C., 194, 7th ed.

(d) 19 & 20 Vict. c. 108, s. 39.

The record of such proceeding is to be transmitted to the proper officer of the High Court. (a)

If a cause is removed from an inferior court having jurisdiction in the cause, the costs in the court below are to be costs in the cause. (b)

Where an action of contract is brought in the High Court for a sum not exceeding 50*l.* the defendant may, within eight days from the service of the writ of summons apply to a judge of the High Court at chambers for an order that the action be transferred to a County Court; and if the order is made the plaintiff must lodge the original writ and order with the registrar of the County Court mentioned in the order. The costs subsequent to the order are according to the County Courts scale, the previous costs according to the scale of the High Court. (c)

In any action for malicious prosecution, illegal arrest or distress, assault, false imprisonment, libel, slander, seduction, or other action of tort brought in the High Court, the defendant may, on affidavit that the plaintiff has no visible means of paying the costs should a verdict be found against the plaintiff, apply to a judge of the court for an order that the action be stayed unless the plaintiff give security for such costs to the satisfaction of a master, or satisfy the judge that he has good cause for continuing the action in the High Court; or if the plaintiff is unable or unwilling to give such security, or fails to satisfy the judge as aforesaid, that the action be remitted to a County Court; if the order is made the plaintiff must lodge the original writ and order with the registrar of the County Court named in the order. (d)

#### CHANGE OF PARTIES BY DEATH, MARRIAGE, &c.

The practice hereon, stated *ante*, pp. 212 to 215, applies to

(a) 36 & 37 Vict. c. 66, ss. 89, 90; C. C. R. 1875, O. 20, r. 7.

(b) Ord. 65, r. 3.

(c) 30 & 31 Vict. c. 142, s. 7; 36 & 37 Vict. c. 66, s. 67. See also

19 & 20 Vict. c. 108, s. 26; Ord. 65, r. 4.

(d) 30 & 31 Vict. c. 142, s. 10; 36 & 37 Vict. c. 66, s. 67.



actions in the Queen's Bench Division, save that no order in this division can be obtained on petition (*ante*, p. 214) of course.

#### PROCEEDINGS IN CHAMBERS.

The proceedings detailed under this head (*ante*, pp. 216 to 230) apply only to proceedings in chambers of the Chancery Division. We do not wish it to be understood that accounts, &c., cannot be ordered to be taken by the Queen's Bench Division, or by a judge of such division; Order XXXIII. (stated *ante*, pp. 220, 223, 224) is not confined to any particular division, and it has been recently held that accounts arising in an action in this division could be more conveniently and expeditiously taken before an official referee than before a Chancery chief clerk. (a) However, as shown *ante*, p. 11, "the taking of partnership or other accounts" is one of matters assigned to the Chancery Division of the High Court; and the provisions of Order LV. (detailed *ante*, Chap. XXII.) are confined to proceedings in the chambers of the Chancery Division.

#### FURTHER CONSIDERATION.

Although a judge of the Queen's Bench Division may at or after the trial either direct that judgment be entered for any or either party or adjourn the case for further consideration (b), or the divisional court on an application for a new trial may do this (c), the practice stated *ante*, Chap. XXIII., applies only to the Chancery Division.

#### COSTS.

The general rules as to costs, stated *ante*, pp. 233 to 238, apply to actions in the Queen's Bench Division. The practice as to taxation of costs, however, in this and the Chancery Division differs; the practice in the latter division is stated *ante*, pp. 235, 236. In the Queen's Bench Division the party

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(a) *Newbould v. Steade*, 49 L. T. Rep. N. S. 649, C. A.

(b) Ord. 36, r. 39.

(c) Ord. 40, r. 10.

whose costs are to be taxed after making out his bill of costs, delivers a copy thereof and of the affidavit of increase, if any, and notice of taxation to the opposite party, as detailed *ante*, p. 234; the parties then attend before one of the masters of the Supreme Court, whose duty it is to tax the costs. In the Chancery Division the taxation of costs takes place before the taxing master in rotation whose special duty is the taxation of costs, as already stated.

In this division also the question of costs may be affected by the County Courts Acts, and Rules of Court thereon. In actions founded on contract in which the plaintiff recovers by judgment or otherwise, a sum (exclusive of costs) not exceeding 50*l.*, he is entitled to no more costs than he would have been entitled to had he brought his action in a County Court, unless the court or a judge otherwise orders. (a)

In any case in which under the above rule the scale of costs in County Courts is applicable, the costs of briefing more than one counsel is not to be allowed unless the taxing officer, for special reasons, is of opinion that briefing more than one counsel was proper. (b)

And in actions of tort the 30 & 31 Vict. c. 142, provides that if the plaintiff sues in the High Court and recovers a sum not exceeding 10*l.*, by judgment or otherwise, he is not entitled to costs unless the judge certifies that there was sufficient reason for bringing the action in the High Court, or unless a judge at chambers by order allows such costs. (c) However, as stated *ante*, p. 233, where a cause or issue is tried with a jury the costs are to follow the event unless otherwise ordered.

A set-off for damages or costs between parties may be allowed notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought. (d)

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(a) Ord. 65, r. 12.

(b) Ord. 65, r. 27, sub-r. 46.

(c) 30 & 31 Vict. c. 142, s. 5.

(d) Ord. 65, r. 14.

## CHAPTER XXVI.

### SOLICITOR AND CLIENT.

A SOLICITOR should, as a matter of precaution, before commencing an action for, or entering an appearance in an action brought against, a client have a retainer from such client.

Before the name of any person can be used in any action as next friend of any infant or other party, or as relator, such person must sign a written authority to the solicitor for that purpose, which must be filed in the Central Office, or in the district registry if the cause or matter is proceeding therein (a)

With the above exception the retainer may be by parol. To facilitate proof, however, it is better to have a written retainer, as the onus of proving the retainer lies on the solicitor. (b)

If a solicitor neglects to enter an appearance in an action in pursuance of his written undertaking to do so, he is liable to an attachment. (c)

If a solicitor commences an action without the authority of the plaintiff, the plaintiff should serve the defendant and the solicitor with notice of motion to dismiss the action with costs against the solicitor, the costs of the plaintiff to be taxed between solicitor and client, and those of the defendant between party and party. (d)

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(a) Ord. 16, r. 20.

(b) Cord. Sol. 47; Morgan and Wurtz, Costs, 89.

(c) Ord. 12, r. 18.

(d) *Newbiggin-by-Sea Gas Co. v. Armstrong*, 18 Ch. Div. 310; 41 L. T. Rep. N. S. 637; 49 L. J. 231, Ch.; 28 W. R. 217.

A party suing or defending by solicitor may change his solicitor without an order for such purpose, upon notice of such change being filed in the Central Office, or in the district registry if the cause or matter is proceeding therein; but until such notice is filed and a copy thereof served, and, in causes or matters pending in the Chancery Division, left in the chambers of the judge to whom such cause or matter is assigned, the former solicitor is to be considered the solicitor of the party. (a)

A solicitor may enter into a written agreement with his client respecting the payment of his fees, charges, and disbursements for business done or to be done, either by a gross sum or by a percentage or salary, or otherwise. But if the agreement is for business done, or to be done, in any action, the agreement must, before the amount can be received, be examined and allowed by the taxing officer. And a provision in such agreement that the solicitor is not to be liable for negligence is void. Nor can such agreement be enforced by action, but questions affecting it and its enforcement should be brought before the court or judge by motion or petition; and the court or judge may either enforce it or set it aside, and order the costs to be taxed. And even if the amount agreed upon has been paid the court or judge may, under special circumstances, reopen the agreement within twelve months after payment, and order taxation and repayment of the whole or part of the amount. However, the amount due under such an agreement as above is not, unless ordered by the court or a judge, subject to taxation, or to necessitate the delivery of a signed bill. (b)

Such an agreement to be binding must be signed by both solicitor and client. (c)

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(a) Ord. 7, r. 3.

(b) 33 & 34 Vict. c. 23, ss. 4, 7, 8, 9, 10, 15. And as to death or change of solicitor, see ss. 13, 14.

(c) *Re Lewis; ex parte Munro*, 1 Q. B. Div. 724.

As to the law relating to the costs of solicitors in conveying and non-contentious business the reader is referred to the 44 & 45 Vict. c. 44, and the General Order and Rules thereon.

Although the undertaking of a solicitor to carry on an action is an entire contract to carry it on to its termination, and can be determined by the attorney only upon reasonable notice, yet a solicitor who has undertaken a cause is not bound to proceed in it without adequate advances, from time to time, by the client, for expenses out of pocket. (a)

A solicitor may take security from his client for his future charges, fees, and disbursements, to be ascertained by taxation or otherwise. (b)

A solicitor cannot recover costs, &c., for business done while uncertificated.

If a solicitor wishes to enforce his claim for professional charges by action he must, one calendar month before he commences his action, deliver or send to the party charged a bill of his fees, charges, and disbursements, subscribed by such solicitor, or inclosed in or accompanied by a letter signed by him and referring to the bill, unless a judge allows proceedings to be taken before this period when such party is about to quit England, &c. (c)

But a solicitor may set off the amount of his bill of costs in an action brought against him by his client, although he has not delivered a signed bill a month before the action. (d)

The party chargeable by the bill may, within such month, apply to the court or a judge for an order referring such bill for taxation, and the action may be restrained pending such reference. After the expiration of such month, either the solicitor or the client may obtain the order for taxation of such bill. But after a verdict has been obtained in an action

(a) Chit. Arch. 91, 12th ed.

(b) 33 & 34 Vict. c. 28, s. 16.

(c) 6 & 7 Vict. c. 73, s. 37; 38  
& 39 Vict. c. 79, s. 2.

(d) *Brown v. Tibbetts*, 31 L. J.  
206, C. P.; 6 L. T. Rep. N. S. 385.

on the bill, or after the expiration of twelve months after such bill has been delivered or sent as above, no order for taxation can be obtained at the instance of the party chargeable with such bill, except under special circumstances, to be proved to the satisfaction of the court or judge, (a)

Upon the taxation of a solicitor's bill of costs between solicitor and client, if it includes charges for business done in any cause or matter, the taxing officer may allow the fees on the higher scale, in respect of such cause or matter, or in respect of any particular application or business done therein, if on such special grounds as are mentioned in rule 9 of this order (see *ante*, p. 233) he thinks such allowance should be made. (b)

Interest may be allowed upon the taxation of costs, charges, or disbursements by the taxing officer, upon moneys disbursed by the solicitor for the client, or on moneys of the client in the hands of the solicitor and improperly retained by him. (c)

If it appears that costs have been improperly incurred, or, if in consequence of misconduct or negligence of the solicitor, costs properly incurred have proved fruitless, the court or judge may call upon the solicitor to show cause why such costs should not be disallowed as between the solicitor and his client, and if necessary, why the solicitor should not repay to the client any costs paid by the client under order to any other person. And special directions thereon may be given to the taxing officer. (d)

A solicitor, or his representative after his death, has a passive lien for his general balance upon deeds or papers of his client (commensurate with the right of the client) which have come to his hands in the way of his professional employment. (e)

(a) 6 & 7 Vict. 73, ss. 37, 41.

(b) Ord. 65, r. 10.

(c) 33 & 34 Vict. c. 28, s. 17.

See also 23 & 24 Vict. c. 127, s. 27.

(d) Ord. 65, r. 11.

(e) Chit. Arch. 135, 138, 12th ed.; Cord. Sol. 211.

So, by the order of the court or judge, the solicitor has a lien or charge upon property of any nature, tenure, or kind recovered or preserved through the instrumentality of such solicitor, for his taxed costs of suit ; and all conveyances, &c., to defeat such charge are void, except as against a *bonâ fide* purchaser for value without notice. (a)

And independently of any statute a solicitor has a particular lien on a judgment obtained by him, and upon money levied under an execution upon it, for his costs of the action in which the money is recovered. (b)

A set off for damages or costs between parties may be allowed notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set off is sought. (c)

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(a) 23 & 24 Vict. c. 127, s. 28.

(b) Cord. Sol. 211, 221.

(c) Ord. 65, r. 14.

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# INDEX.

<b>ABATEMENT:</b>	<b>PAGE</b>
action does not abate when ... ..	212, 213, 283
<b>ACCOUNT:</b>	
indorsement for, on writ ... ..	36, 52, 220
when may be ordered ... ..	52, 220, 221, 284
how to be verified ... ..	221, 223, 225
form of ... ..	223
not to be annexed to affidavit... ..	223
notice of intention to dispute ... ..	223
how set out in chief clerk's certificate... ..	227
<b>ACTION:</b>	
causes of, assigned to Chancery Division ... ..	11
how commenced ... ..	17
assignment of, to division of court ... ..	18, 41, 246
parties to ... ..	19, 34, 247
alternative relief in ... ..	27
for a debt ... ..	36, 246, 249
for an account ... ..	36
for recovery of land... ..	38, 45
in this country and abroad ... ..	39
causes of ... ..	11, 38, 246
what must be subject-matter of, when defendant	
abroad ... ..	43, 44
when assigned to a master ... ..	246
how to be distinguished ... ..	41
transfer of, from one division to another, 206, 207,	
and note (e) ... ..	281
transfer of, from one judge to another... ..	207, 281
transfer of, from and to district registries ... ..	208, 282
transfer of, from and to County Courts ... ..	210, 282
further consideration of ... ..	228, 231, 284
<b>ADDRESS FOR SERVICE:</b>	
by plaintiff ... ..	37
by defendant ... ..	49
on petition... ..	185
on originating summons at chambers ... ..	219, 277



<b>ADMINISTRATION :</b>	<b>PAGE</b>
judgment for, by some only of parties interested	20, 21
order for, may be obtained on summon at chambers	216, 218
parties entitled to appear on summons for ...	221, 222
<b>ADMINISTRATOR :</b>	
action by ...	21
representing parties beneficially interested...	21, 22
verifying account ...	223
verifying claims ...	225
<b>ADMISSION :</b>	
in pleadings ...	59, 76, 94
in statement of defence ...	76
in the reply ...	94
<b>ADVERTISEMENTS :</b>	
for parties to come in under judgment ...	224
only one peremptory issued ...	224
<b>AFFIDAVIT :</b>	
of service of writ of summons ...	45
in answer to interrogatories ...	107
exceptions to answer to interrogatories cannot be taken ...	106
description of ...	126
evidence by ...	126
court may refuse to allow evidence by...	127
how drawn up ...	127
to be confined to facts in witness's own knowledge ...	128
jurat of ...	128
interlineations and alterations, how authenticated in	128
how refers to documents...	128, 129
before whom sworn in England ...	129
before whom sworn in Scotland, or Ireland, or colony, &c. ...	129
by illiterate or blind person ...	129
striking out scandalous matter in...	130
must state on whose behalf filed ...	130
within what time to be filed when evidence taken by	130
when to be printed ...	130, 131
furnishing copies of ...	131
cross-examination on ...	127, 131, 132
may be used at chambers ...	127, 223
to be used in Queen's Bench Division...	260
<b>AMENDMENT :</b>	
of writ of summons ...	47, 248
of pleadings ...	58, 59
of statement of claim ...	69
of statement of defence ...	75

<b>AMENDMENT—continued :</b>	<b>PAGE</b>
of counter-claim .. .. .	79
of reply .. .. .	94, 95
of special case .. .. .	101
on appeal .. .. .	197, 200
<b>APPEAL :</b>	
constitution of court of .. .. .	12
jurisdiction of court of .. .. .	12
final court of .. .. .	13
on interpleader... .. .	191
general right of .. .. .	192, 281
notice of .. .. .	192, 193, 194, 195
against order granted by consent, or as to costs not allowed except by leave .. .. .	192
against order made in chambers .. .. .	193, 281
powers of court of .. .. .	193, 197
how brought .. .. .	193, 194
time limited for .. .. .	194
proceedings on... .. .	194, 195
setting down .. .. .	194, 195
notice by respondent to vary decision of court below	195
application to judge of court of .. .. .	195
two counsel heard on .. .. .	195
deposit on .. .. .	196
security for costs on .. .. .	196
does not stay proceedings .. .. .	196, 278
application to court below or to court of, when .. .. .	196
evidence on .. .. .	196, 197
effect of neglect to appeal from interlocutory order on	198
amendments on... .. .	197, 200
court of, may order new trial... .. .	198
costs on .. .. .	198
interest on... .. .	198
to House of Lords .. .. .	198
from Queen's Bench Division .. .. .	281
<b>APPEARANCE :</b>	
if not entered for infant or lunatic not so found .. .. .	33
where entered .. .. .	48, 249
time for .. .. .	48, 49
after judgment... .. .	49
how entered .. .. .	49
setting aside .. .. .	49
notice of .. .. .	50
effect of .. .. .	50
by partners .. .. .	50
by several defendants .. .. .	50
by person not named in a writ claiming land .. .. .	51
solicitor entering without authority .. .. .	51

<b>APPEARANCE—continued :</b>	<b>PAGE</b>
effect of solicitor giving undertaking for ... ..	52, 286
by person not a party ... ..	51
default of, to action for account ... ..	52
default of, to action for recovery of land ... ..	53, 150, 249
default of, for liquidated demand ... ..	53, 249
default of, at trial ... ..	140, 141
default of, to a claim for detention of goods ... ..	249
in district registry ... ..	48, 52, 250
on appeal ... ..	199
to originating summons ... ..	219
<b>ARBITRATION :</b>	
under Procedure Acts ... ..	264, 265
what matters referred ... ..	264, 265
modes of reference... ..	264, 265
arbitrator may state special case ... ..	265
how conducted ... ..	265
compelling attendance of witnesses on... ..	265
remitting matters back ... ..	265
default in appointing arbitrator ... ..	266
appointing umpire ... ..	266
within what time award to be made ... ..	266
appeal on ... ..	267
setting aside award ... ..	267
enforcing award ... ..	267, 268
taxation of costs on ... ..	268
<b>ARREST :</b>	
under Debtors Act ... ..	279, 280
privilege from ... ..	280
<b>ASSESSORS :</b>	
trial with assistance of ... ..	142, 263
<b>ASSIZES :</b>	
trial at ... ..	10, 139, 140, 242, 245
<b>ATTACHMENT :</b>	
cannot issue without leave ... ..	160, 164
in what cases issued... ..	108, 163
by whom executed ... ..	164
<b>ATTACHMENT OF DEBTS :</b>	
order for, how obtained ... ..	166
what debts may be attached ... ..	167, 168
what debts not attachable ... ..	167
garnishee must pay debt or dispute liability ... ..	168
payment by garnishee a good discharge ... ..	169
<b>ATTORNEY—GENERAL :</b>	
a party to action, when ... ..	25, 26, 33, 34
<i>dominus litis</i> of Crown suits... ..	25
<b>AWARD (see ARBITRATION).</b>	

<b>BANKRUPTCY :</b>	<b>PAGE</b>
who to sue in case of ... ..	26
does not abate action when ... ..	212, 213
court of, may restrain actions ... ..	175 note (c)
transfer of actions on ... ..	207 note (e)
<b>CANCELLATION OF DOCUMENTS :</b>	
action for, assigned to Chancery Division ... ..	11
<b>CAUSES OF ACTION :</b>	
what assigned to Chancery Division ... ..	11
several may be joined without leave when ... ..	38, 248
in what cases leave necessary for joinder of ... ..	38, 39
striking out ... ..	38, 39
to found service abroad ... ..	43, 44
in Queen's Bench Division ... ..	246
<b>CHAMBERS (see CHIEF CLERK and SUMMONS AT CHAMBERS).</b>	
<b>CHANCELLOR, LORD :</b>	
ordinary and extraordinary jurisdiction of ... ..	2, 3
principals on which early decisions founded ... ..	3
distinguished chancellors ... ..	5
president of Chancery Division of High Court ... ..	10
<b>CHANCERY COURT :</b>	
origin and history of ... ..	1
early mode of proceedings in ... ..	2, 3, 4
ordinary jurisdiction of ... ..	2
extraordinary jurisdiction of ... ..	2, 3
principles on which early decisions of, formed ... ..	3
ceased to follow king when ... ..	3
gave redress against violence ... ..	3
proceedings of commons against ... ..	4, 5
power of, to set aside judgments of common law courts ... ..	5
distinguished judges of ... ..	5, 7
present judges of ... ..	10
causes of action assigned to ... ..	11
<b>CHANGE OF PARTIES :</b>	
by death ... ..	212, 213, 283
by marriage ... ..	212, 213, 283
by bankruptcy ... ..	212, 213, 233
by assignment or devolution ... ..	213
order for ... ..	214, 284
<b>CHARGING ORDER ... ..</b>	<b>169</b>
<b>CHIEF CLERK (see also SUMMONS AT CHAMBERS) :</b>	
applications at chambers made to ... ..	14, 189, 245
orders of ... ..	189
notes of proceedings before ... ..	189
powers of ... ..	188, 189, 221, 222, 245

<b>CHIEF CLERK—continued:</b>	<b>PAGE</b>
directions to take accounts and make inquiries	219, 220, 221
parties to attend before in an administration action	221
directing advertisements to be issued	224
proving claims before	224
certificate of	220, 227, 228
appeal from	189, 222, 230
certificate of, to be filed	228
certificate of, when binding	228
how sale conducted by	228, 230
<b>CLAIMS:</b>	
how entered	225, 226
how verified	225
interest on	226
<b>CO-DEFENDANT:</b>	
contribution against	83, 253
<b>COMMENCEMENT OF PROCEEDINGS</b>	17, 245
<b>COMMON LAW COURTS:</b>	
origin and history of	239, 240, 241
<b>COMMON PLEAS:</b>	
court of	239, 240
<b>CONCURRENT WRIT</b>	40, 248
<b>CONSOLIDATION OF ACTIONS</b>	39
<b>CO-PARTNERS:</b>	
suing in name of firm	19
action against	28, 29
judgment against	28, 29
execution against	160, 162
<b>COSTS:</b>	
of improper indorsements on writ	18
of application to extend time for taking proceedings	63
when statement of claim improperly delivered	68
on moving to dismiss action	68
of improper denials in statement of defence	76
on confession of defence arising after action brought	75
on a counter-claim	81
on acceptance of money paid into court in satisfaction	85
on discontinuance of action	98
of vexatious interrogatories	111
of proving documents	132
no subpoena for payment of	163, 236
sequestration for	160, 163
of petition	187
of interpleader	191, 281
appeal on, when allowed	192, 284
in discretion of court	233, 284
of executors, administrators and trustees	233

<b>COSTS</b> — <i>continued</i> :	<b>PAGE</b>
between solicitor and client ... ..	233, 287, 289
between party and party... ..	233, 284
on trial by jury... ..	233
higher and lower scale of ... ..	233, 234, 284
what costs allowed between party and party ...	234, 235
gross sum for, where allowed... ..	235, 285
neglecting to bring in bill for taxation ... ..	235
preparing bill for taxation ... ..	234, 235, 284
notice of taxing when ... ..	234
taxation of ... ..	234, 235, 236, 268, 284, 287, 289
execution for ... ..	163, 236
security for, when ordered ... ..	237
time to apply for security for ... ..	237, 238
to whom bond given ... ..	238
under County Courts Acts ... ..	285
set off may be pleaded notwithstanding solicitor's lien for ... ..	285, 290
agreement for ... ..	287
action for ... ..	288
<b>COUNSEL</b> :	
pleadings need not be signed by ... ..	56
address of, at trial ... ..	141, 142, 263
how heard on appeal ... ..	195, 200
<b>COUNTERCLAIM</b> :	
when may be pleaded ... ..	72, 77, 253
how to be stated ... ..	77
against plaintiff and third person... ..	77
what not a ... ..	77
may be joined with statement of defence ... ..	78
title of ... ..	78
claim for relief in ... ..	78
time for delivering ... ..	79
appearance to ... ..	79
answer to ... ..	79
amendment of ... ..	79, 80
excluding ... ..	77, 80
striking out matter in ... ..	80
admitting ... ..	80
judgment on ... ..	81
costs on ... ..	81
<b>COURT</b> :	
of Chancery ... ..	1
High Court ... ..	9, 10, and note (b), 243
of Appeal... ..	12, 192, 198, 281
sittings and vacations of the... ..	14, 15, 245
action to be assigned to proper division of ...	11, 18, 41
divisional ... ..	244

	PAGE
<b>CREDITOR :</b>	
claim of, how proved ... ..	225
when allowed interest ... ..	226
<b>CROWN :</b>	
actions on behalf of ... ..	25, 26, 33, 34
<b>DEATH :</b>	
does not abate actions when ... ..	212, 213
<b>DE BENE ESSE :</b>	
taking evidence... ..	125
<b>DECREE :</b>	
declaratory, may be made ... ..	70, 100
may be given in evidence ... ..	134
judgment includes ... ..	150
<b>DEFAULT :</b>	
of appearance to writ ... ..	52, 53, 249, 250
of pleading ... ..	53, 67, 69, 73
at trial ... ..	140, 141
on summons at chambers ... ..	189, 222
on interpleader summons, ... ..	191
<b>DEFENCE (see also STATEMENT OF DEFENCE) :</b>	
different modes of ... ..	72, 251
withdrawal of ... ..	92, 257
plaintiff's proceedings after ... ..	93, 257
default of ... ..	53, 73, 150, 252
<b>DELIVERY :</b>	
writ of ... ..	163
<b>DEMURRER :</b>	
derivation of ... ..	100
abolished ... ..	100
pleadings in lien of ... ..	100, 101, 258
<b>DIRECTIONS :</b>	
summons for ... ..	65, 251
<b>DISABILITY :</b>	
parties under ... ..	19
<b>DISCLOSURE :</b>	
by firm of partners ... ..	19, 20, 28
by solicitor as to authority to issue writ ... ..	47, 248
<b>DISCONTINUANCE :</b>	
by plaintiff ... ..	98
by defendant ... ..	93, 99
costs of ... ..	93, 98, 99
form of notice of, not material ... ..	98
after entry of cause for trial ... ..	99
in the Queen's Bench Division ... ..	257

**DISCOVERY (see also DOCUMENTS AND INTERROGATORIES):**

early exercise of, by Court of Chancery	... PAGE 3
of facts and documents	... 104, 258
in what actions, is of right	... 104
when leave necessary for	... 105
as to facts—	
to what entitled	... 105, 106, 258
third parties not entitled to	... 105
may be obtained in action for recovery of land	... 106
from body corporate	... 106
at what time application for, to be made	... 105, 106
to be answered by affidavit	... 107
no exceptions to affidavit	... 108
further may be required	... 108
what privileged from	... 108, 258
may be reserved by court	... 109
effect of not complying with order for	... 109
service of order for, may be on solicitor	... 109
may be used in evidence	... 109
deposit for costs on	... 109, 110
costs on	... 111
as to documents—	
how obtained	... 111, 258
affidavit in support may be required	... 111, 112
when application to be made	... 112
deposit for costs on	... 112
affidavit in answer	... 112
objection to give	... 112, 258
judge may order oral examination of party as to	... 113
judge may order at any time	... 113
reserving right to	... 113
to what documents party entitled to	... 113, 258
effect of not complying with order for	... 113
in aid of execution	... 166

**DISTRICT REGISTRY :**

when open	... 15
commencing action in	... 17, 40, 202, 281
authority of registrar	... 202
appearance in	... 48, 203, 250
transmitting documents from	... 48, 208
proceedings in	... 203, 204, 250
filing pleadings in	... 204
order for account cannot be made in	... 204
cannot appoint a receiver	... 204
applications to registrar made by summons	... 204
registrar may refer matter to judge	... 204
execution may be issued out of	... 161, 205
appeal from	... 205, 281



<b>DISTRICT REGISTRY—continued:</b>	<b>PAGE</b>
taxation of costs in ... ..	205
transfer of actions to and from ... ..	208, 209, 282
<b>DISTRINGAS:</b>	
writ of abolished ... ..	169, and note
<b>DOCUMENTS (see also DISCOVERY AND INTERROGATORIES):</b>	
discovery of ... ..	111, 112, 258
production and inspection of ... ..	113, 114, 260
notice to produce ... ..	113, 114, 123
notice to take inspection of ... ..	114
effect of not complying with notice to inspect or produce ... ..	114
refusal to solicitor ... ..	114
grounds of refusing production ... ..	118
rule as to production of ... ..	115
when relate to other matters ... ..	115
where inspection ordered ... ..	115
where deposited on order ... ..	116
next friend of infant cannot be compelled to produce	116
guardian <i>ad litem</i> need not answer interrogatories as to ... ..	116
notice to admit and produce ... ..	132, 133
proof of notice ... ..	133
when prove themselves ... ..	133
when may be proved as exhibits ... ..	133, 134
<b>DOUBLE VEXATION:</b>	
not allowed when ... ..	39
<b>ELEGIT:</b>	
writ of ... ..	164, 236
<b>EMBARRASSING:</b>	
when pleading is ... ..	76
<b>ENFORCEMENT OF JUDGMENTS (see EXECUTION).</b>	
<b>EVIDENCE (see also AFFIDAVIT, WITNESSES):</b>	
cannot be stated in pleadings ... ..	56, 117
different modes of taking ... ..	117
<i>vivâ voce</i> to be taken in court or before an examiner ... ..	117, 118, 258
in Queen's Bench Division ... ..	258, 259, 260
when witness examined before an examiner of the court ... ..	118, 119, 259
when taken on commission ... ..	119, 122, 259
how taken before examiner ... ..	120, 259
giving depositions in evidence ... ..	122, 260
by admissions ... ..	124
<i>de bene esse</i> ... ..	125
by affidavit ... ..	126, 258, 259

<b>EVIDENCE—continued:</b>	<b>PAGE</b>
formal consent to take by affidavit ... ..	127
by affidavit on motion, petition, or summons ... ..	127
admission of documentary ... ..	132, 259
proving documentary ... ..	133, 134
in actions to perpetuate testimony ... ..	134
on motions ... ..	127, 173
on application for injunction ... ..	176
on petition... ..	127, 186
on summons ... ..	127, 223
<b>EXCHEQUER:</b>	
court of ... ..	239, 241
<b>EXECUTION:</b>	
on special case ... ..	101
judgments enforced by ... ..	159, 273
by and against persons not parties ... ..	159
in what cases leave necessary before issuing ... ..	159, 160, 163
may issue within six years if no change of parties ... ..	160
issues from what office ... ..	161
how issued... ..	161
date of writ of ... ..	161
indorsements on writ of ... ..	161
writ of, in force for year... ..	162
renewal of ... ..	162
against partners ... ..	160, 162
for money and costs... ..	162
for costs ... ..	162, 163, 236
to enforce payment of money into court ... ..	163
for delivery up of possession of land ... ..	163
for recovery of property other than land or money ... ..	163
against a corporation ... ..	163
to enforce acts other than payment of money ... ..	163
within what time issued... ..	164
by imprisonment ... ..	273, 274
<b>EXECUTOR:</b>	
action by ... ..	21
action against ... ..	27
representing class ... ..	21, 22, 27
administration by ... ..	220
verifying claims ... ..	225
<b>FIERI FACIAS:</b>	
writ of ... ..	164
<b>FILING:</b>	
pleadings ... ..	58, 69
special case ... ..	101
<b>FORECLOSURE:</b>	
action of assigned to Chancery Division ... ..	11
against an infant, day to show cause ... ..	158

<b>FOREIGN GOVERNMENT:</b>	<b>PAGE</b>
action by ... ..	26
action against ... ..	34
<b>FURTHER CONSIDERATION:</b>	
in chambers ... ..	228, 284
in court ... ..	231, 284
time for setting down cause on ... ..	228, 231
before whom cause heard on ... ..	231
evidence on ... ..	231, 232
order on ... ..	232
<b>GUARDIAN AD LITEM:</b>	
for infant defendant ... ..	32
for lunatic ... ..	33, 116
<b>GARNISHEE (see ATTACHMENT OF DEBTS).</b>	
<b>HABEAS CORPUS AD TESTIFICANDUM</b> ... ..	123
<b>HOUSE OF LORDS:</b>	
appeal to ... ..	13, 198
<b>HUNDRED:</b>	
service of writ on ... ..	42
<b>INDORSEMENT:</b>	
of writ of summons ... ..	35, 36, 37
special ... ..	36
of claim ... ..	35, 36
of address for service ... ..	37, 38, 49, 185, 219, 277
of service of writ ... ..	38
<b>INFANT:</b>	
sues by next friend ... ..	23
proceedings when no appearance for ... ..	33
defends by guardian ... ..	33
guardian <i>ad litem</i> for ... ..	32
what necessary when party to a special case ... ..	101
next friend of, not a party to an action ... ..	116
order for production cannot be made against next friend of ... ..	116
judgment against ... ..	158
<b>INJUNCTION:</b>	
claim for may be joined with claim for quiet possession ... ..	38
what ... ..	175
writ of, abolished ... ..	175, 176
motion for ... ..	61, 174, 175
court may grant, though writ not indorsed with claim for ... ..	175
cannot issue to restrain action in another division ... ..	175 and note (c)
application for ... ..	61, 174, 175, 176, 275

<b>INJUNCTION—continued:</b>	<b>PAGE</b>
evidence on motion for ... ..	176
order for ... ..	175, 176
discharging order for ... ..	176
serving order for ... ..	176
awarding damages on application for ... ..	177
punishment for disobedience of order for ... ..	177
may be granted after judgment ... ..	177
<b>INTERPLEADER:</b>	
when and how granted ... ..	190
time to apply for ... ..	190
titles of claimants ... ..	190
power to stay action in ... ..	190
power to direct issue ... ..	190
summary decision on ... ..	190, 191
when question on, is one of law ... ..	191
special case in ... ..	191
barring claimants in ... ..	191
power to order sale on ... ..	191
judgment on ... ..	191
appeal on ... ..	191
costs on ... ..	191
<b>INTERROGATORIES (see also DISCOVERY, DOCUMENTS):</b>	
in what action may be delivered as of right ... ..	104
to several defendants or plaintiffs ... ..	104
when leave necessary to deliver ... ..	104, 105
time to deliver ... ..	104, 105
third persons cannot deliver ... ..	105
answer to ... ..	105, 106, 107
questions to be relevant ... ..	105, 106, 107
rule as to, in Queen's Bench Division ... ..	105
rule as to, in Chancery Division ... ..	105
in action for recovery of land ... ..	106
not allowed after close of pleadings ... ..	106
to officer of corporation ... ..	106
setting aside ... ..	107
striking out ... ..	107
affidavit in answer to ... ..	107, 108
objections to affidavit in answer ... ..	108
improper ... ..	107, 108
grounds of refusal to answer ... ..	107, 108
no exceptions to affidavit in answer ... ..	108
insufficient answers ... ..	108
reserving right to answer ... ..	109
punishment for, neglect to answer ... ..	109
service of order for on solicitor ... ..	109
deposit for costs on ... ..	109, 110
costs on ... ..	111

INTERLOCUTORY APPLICATIONS	...	PAGE 60, 61
ISSUE:		
when may be joined...	...	97
effect of joinder of ...	...	97
facts may be excepted in joinder of ...	...	97
joinder of, closes pleadings ...	...	95, 97
judge may direct and settle ...	...	97
in interpleader ...	...	190
costs of, on trial by jury...	...	233
in the Queen's Bench Division ...	...	257
JOINDER:		
of causes of action ...	...	38, 39, 248
of third persons as parties by defendant ...	...	51, 81, 253
of issue ...	...	97, 257
JUDGMENT:		
by default of appearance...	...	45, 53, 249
setting action down for where no defence delivered		
	53, 73, 252, 253	
on confession of defence arising after action brought	75	
on counter-claim ...	81, 253	
on discontinuance ...	98, 257	
on default at hearing ...	140, 141, 262	
on payment of money into court ...	85, 254	
on points of law ...	100, 102, 258	
on special case ...	101, 102, 258	
by order of referee ...	144 and note (c), 145, 152	
includes decree ...	150	
what ...	150, 268	
different kinds of ...	150, 268	
in actions for recovery of land ...	53, 150	
on admissions of fact in pleadings ...	151, 269	
at trial ...	142, 151, 269	
by referee ...	144, 270	
cannot be entered up after trial without order ...	151, 269	
on motion for judgment ...	151, 152, 153, 270, 271	
setting aside ...	152, 157, 270	
how usually delivered ...	154, 270	
abstaining from going ...	152, 170	
notes of ...	154	
bespeaking...	154	
settling ...	154, 155	
entering ...	155, 272	
speaking to on minutes ...	155	
varying ...	155	
delaying carriage of...	156	
from what time takes effect ...	156, 273	
correcting clerical mistakes in ...	156	
need not be enrolled ...	157, 273	

<b>JUDGMENT—continued:</b>		<b>PAGE</b>
serving parties with notice of	... ..	21, 157, 273
on condition	... ..	157, 159, 273
infant plaintiff bound by	... ..	158
infant defendant may show cause against when	... ..	158
enforcement of	... ..	159, 170, 273
of Court of Appeal	... ..	197, 198
of House of Lords	... ..	200
of district registrar	... ..	205
for an account	... ..	220
of nonsuit	... ..	263
how entered in Queen's Bench Division	... ..	264, 268
by consent	... ..	272
<b>JURY:</b>		
judge of equity division cannot try cause with	... ..	139
costs on trial of cause by	... ..	233, 285
trial with	... ..	139, 261, 262
<b>KING'S BENCH COURT:</b>		
history and jurisdiction of	... ..	239, 241
<b>LAND:</b>		
action for recovery of	... ..	37, 51, 53, 54, 75, 150, 248, 249
<b>LAW:</b>		
questions of, how raised	... ..	100, 102, 258
<b>LEGATEE:</b>		
obtaining judgment without serving others	... ..	20
entitled to interest when	... ..	227
<b>LIBEL</b>	... ..	262, 263
<b>LUNATIC:</b>		
action by	... ..	23
action against	... ..	33
proceedings when no appearance entered for	... ..	33
party to special case	... ..	102
guardian <i>ad litem</i> cannot be compelled to answer in- terrogatories	... ..	116
<b>MANDAMUS:</b>		
when granted	... ..	61, 174, 177, 275
should be claimed by writ of summons	... ..	178
prerogative writ of, cannot be granted by Chancery Division	... ..	178, 275
<i>ex parte</i>	... ..	61, 178
no writ for, in an action	... ..	178
enforcement of order for	... ..	178
<b>MARRIAGE:</b>		
no abatement of action on	... ..	212, 213, 283

<b>MARRIED WOMAN :</b>	<b>PAGE</b>
how sues ... ..	23
does not give security for costs ... ..	24, 237
how defends ... ..	29, 31
party to a special case ... ..	102
<b>MASTER OF ROLLS :</b>	
history of office of ... ..	6, 7
no longer judge of High Court .. ..	10
<b>MASTERS OF SUPREME COURT :</b>	
duties of ... ..	14, 245, 276
what actions assigned to ... ..	246
<b>MISJOINDER :</b>	
action not to be defeated by ... ..	26, 34
<b>MONTH :</b>	
how computed ... ..	62
<b>MOTION FOR JUDGMENT :</b>	
setting down action for where no defence ... ..	53, 151, 153
setting down a special case ... ..	102
when to be applied for ... ..	152, 270, 271
notice of, must be served two clear days ... ..	153, 271
cannot be set down after one year ... ..	153, 271
judgment on ... ..	153, 271
<b>MOTIONS :</b>	
when proper mode of proceeding ... ..	60, 171, 274
division of ... ..	171, 274
court may order notice of, to be given... ..	61
failing notice of ... ..	61, 172
length of notice of ... ..	61, 153, 172, 275
special, how made ... ..	61, 171, 274, 275
may be made <i>ex parte</i> , when... ..	61, 171, 172, 274
what notice of, should state ... ..	153, 172, 271
short notice of ... ..	153, 271
how notice of, served ... ..	172, 173, 275
how heard ... ..	173, 275
evidence on ... ..	173, 275
order on ... ..	173, 275
order on, need not be drawn up, when... ..	173, 174, 275
instances of applications of ... ..	174, 275
of course ... ..	184, 274
<b>NEW ASSIGNMENT :</b>	
not allowed ... ..	95
<b>NEW TRIAL :</b>	
in what cases may be applied for ... ..	147, 148, 268
to what court application for made ... ..	147, 268
how made ... ..	147
time for moving for... ..	147, 149

<b>NEW TRIAL—continued:</b>	<b>PAGE</b>
on motion for court may give judgment ... ..	148
order for, by Court of Appeal ... ..	198
<b>NE EXEAT REGNO:</b>	
when writ of, granted ... ..	181, 182
may be granted though not claimed by writ of summons ... ..	182
how applied for ... ..	182
order for ... ..	182
indorsement, on writ of ... ..	182
execution of writ of... ..	183
discharging writ of ... ..	183
<b>NEXT OF KIN:</b>	
obtaining decree without serving others ... ..	20
representing ... ..	21, 22
inquiry for ... ..	224
<b>NONSUIT</b> ... ..	263
<b>NOTICE:</b>	
of appearance ... ..	50
of motion ... ..	61, 153, 171, 172, 271, 275
service of, on defaulting party ... ..	61, 172
service of, at address for service ... ..	61, 172, 173, 275
length of notice ... ..	61, 153, 172, 271, 275
must be served, before what hour ... ..	63, 172, 275
to produce documents ... ..	113, 133, 260
to admit documents... ..	132
to inspect documents ... ..	113, 260
of trial ... ..	136, 137, 261
of judgment ... ..	21, 157
<b>OFFICE HOURS...</b> ... ..	15, 245
<b>OFFICERS OF THE COURTS</b> ... ..	14, 245
<b>ORDER:</b>	
how drawn up ... ..	154, 173, 275
need not be drawn up, when ... ..	173, 189, 275
from what time takes effect ... ..	62, 156, 174, 275
<b>ORIGINATING SUMMONS</b> ... ..	216, 219, 277
<b>PARTIES TO ACTIONS:</b>	
as plaintiffs ... ..	19, 247
who under disability ... ..	19
joinder of ... ..	19
one suing for rest ... ..	19
co-partners ... ..	19
on partition ... ..	20
legatees ... ..	20
next of kin ... ..	20, 22
heirs ... ..	20, 22



**PARTIES TO ACTIONS—continued :**

	PAGE
devisees ... ..	20
<i>cestui que trust</i> ... ..	20, 21
trustees ... ..	21, 22
for preventing waste ... ..	21
executors and administrators... ..	21
deceased without representatives ... ..	22
infants ... ..	23
lunatics ... ..	23
married women... ..	23, 24
paupers ... ..	24, 25
Crown ... ..	25
Queen Consort... ..	26
Attorney-General ... ..	25, 26
Prince of Wales ... ..	26
foreign government... ..	26
bankrupts ... ..	26
as defendants ... ..	26, 247
bankrupts ... ..	26
all need not be equally interested... ..	26, 27
representing class ... ..	27, 28
trustees, executors, &c. ... ..	29
legatee, next of kin, &c. ... ..	28
partners ... ..	28, 29
married women... ..	29, 30, 31
infants ... ..	32, 33
lunatics ... ..	32, 33
paupers ... ..	33
Crown ... ..	33, 34
Queen Consort... ..	34
Prince of Wales ... ..	34
foreign prince ... ..	34
substituting, adding, or striking out ... ..	34, 35
joinder of, by defendant... ..	51, 81, 253
marriage or death of ... ..	212, 213, 215, 283
bankruptcy of ... ..	26, 212, 213, 215, 283

**PARTITION :**

action for, assigned to Chancery Division ... ..	11
--	----

**PAUPER :**

action by ... ..	24
action against ... ..	33

**PAYMENT INTO COURT :**

when to be pleaded ... ..	72, 84
in satisfaction of claim ... ..	84, 253
acceptance of, by plaintiff ... ..	85, 255
costs on acceptance... ..	85
by a plaintiff ... ..	86

<b>PAYMENT INTO COURT—<i>continued</i>:</b>	<b>PAGE</b>
to abide event ... ..	86, 257
in an interpleader action ... ..	87
proceedings to be taken on ... ..	84, 87, 88, 89, 253
when money to be placed in deposit ... ..	89, 255
in the Queen's Bench Division ... ..	253, 254
<b>PAYMENT OUT OF COURT:</b>	
may be made without order, when ... ..	86, 90, 256
order for ... ..	90, 256
proceedings on ... ..	86, 90, 91
may be made through the post ... ..	90, 256
cheque for... ..	91, 256
conditions on ... ..	91
to official persons ... ..	91, 257
to married women ... ..	92, 257
to representatives ... ..	92, 257
legacy and succession duty to be deducted... ..	92, 257
income tax deducted on ... ..	93, 257
to a creditor ... ..	226
in the Queen's Bench Division ... ..	255, 256
<b>PERPETUATING TESTIMONY:</b>	
when aid of court sought ... ..	134
evidence, how taken ... ..	135
<b>PETITION:</b>	
when proper mode of proceeding ... ..	60, 184, 275
in an action ... ..	185
originating proceedings ... ..	185
to whom addressed ... ..	185
title of ... ..	185
indorsements on ... ..	185
facts, how stated in... ..	186
must state parties to be served ... ..	186
need not be printed... ..	186
copies to be left for use of judge ... ..	186
service of ... ..	61, 186
evidence on ... ..	186
hearing of ... ..	187
order on ... ..	187
costs of ... ..	187
petitions of course ... ..	187
not used in Queen's Bench Division ... ..	275
<b>PLEADINGS:</b>	
general rules of ... ..	55, 250, 251
meaning of ... ..	55
delivery of ... ..	55, 58
how to be marked ... ..	55
contains statement of facts ... ..	56

<b>PLEADINGS—continued :</b>	<b>PAGE</b>
to be divided into paragraphs ... ..	56
to be printed, when ... ..	56
by whom signed ... ..	56
must raise ground of defence or reply... ..	56
not to raise new grounds ... ..	56
need not allege presumptions of law ... ..	56
how documents set out in ... ..	57
how notice alleged in ... ..	57
how denials alleged in ... ..	57
conditions precedent in ... ..	57
how fraud or malice alleged in ... ..	58
technical objections to ... ..	58, 73
cannot be in abatement ... ..	73
amendment of ... ..	58, 59
admitting truth of ... ..	59
noncompliance with rules of ... ..	59
cannot be delivered in long vacation ... ..	62
service of ... ..	63
raising points of law in ... ..	72, 101, 255
subsequent to reply ... ..	96
in lieu of demurrer ... ..	100, 101
<b>POSSESSION :</b>	
writ of ... ..	163
<b>PRINCE OF WALES :</b>	
action by and against ... ..	26, 34
<b>PRODUCTION OF DOCUMENTS (see DOCUMENTS).</b>	
<b>PROTECTION OF PROPERTY PENDING LITI-</b>	
<b>GATION</b> ... ..	183, 275
<b>QUEEN :</b>	
action by ... ..	25
action against ... ..	33
<b>QUEEN CONSORT :</b>	
action by ... ..	26
action against ... ..	34
<b>QUEEN'S BENCH DIVISION :</b>	
origin of ... ..	239, 243
judges and officers of ... ..	243, 245
jurisdiction of ... ..	243, 246
sittings and vacations of ... ..	245
proceedings in ... ..	245
what actions brought in ... ..	246
<b>RECEIVER :</b>	
how appointed ... ..	61, 174, 179, 275
when appointed ... ..	179
writ should be indorsed with claim for ... ..	179

<b>RECEIVER—continued:</b>	<b>PAGE</b>
motion for, by whom made ... ..	179
motion for <i>ex parte</i> , when ... ..	179
evidence in support of motion for ... ..	179
should have no interest in property ... ..	180
who not appointed ... ..	180
to give security ... ..	180
duties of ... ..	180, 181
powers of ... ..	181
remuneration of ... ..	181
discharge of ... ..	181
<b>REGISTRARS (see also DISTRICT REGISTRY):</b>	
duties of, of Chancery Division ... ..	14, 137, 154, 189, 275
<b>REFEREE:</b>	
what matters may be referred to ... ..	142, 143, 264
trial before ... ..	143
when action may be referred to ... ..	142, 143
reference to, by consent ... ..	143
distribution of references to ... ..	143
powers of ... ..	144 and note (c), 270
submitting questions to court ... ..	144
how enforces attendance of witnesses ... ..	144
report of ... ..	145, 146
court may require reasons from ... ..	145
fees payable to ... ..	146
<b>RELIEF:</b>	
alternative ... ..	27, 68
must be claimed by indorsement on writ ... ..	35, 247
how claimed in statement of claim ... ..	68, 251
court may make binding declarations of, without granting... ..	70, 101
<b>REPLY:</b>	
by plaintiff ... ..	94, 257
to be delivered when ... ..	94
effect of not delivering ... ..	95
must not raise new claims ... ..	95
denials in ... ..	95
as to alleging new grounds in ... ..	95, 96
amendment of ... ..	95, 96
further ... ..	96
by persons other than plaintiff ... ..	96, 257
pleadings, subsequent to ... ..	96, 257
<b>SALE:</b>	
proceedings on, in chambers ... ..	229, 230
of perishable goods ... ..	275
<b>SCANDAL:</b>	
what ... ..	69
striking out ... ..	69, 76

<b>SCIRE FACIAS</b> ... ..	<b>PAGE</b>	<b>2</b>
<b>SECURITY FOR COSTS:</b>		
on discovery ... ..	109, 110	
on appeal ... ..	196, 199	
married woman does not give ... ..	24, 237	
by plaintiff ... ..	237, 238	
by limited company ... ..	237	
time to apply for ... ..	237, 238	
bond for ... ..	238	
<b>SERVICE OF PLEADINGS AND NOTICES,</b> 63, 173, and note (c)		
<b>SEQUESTRATION:</b>		
cannot be issued for costs without leave ... ..	160, 163, 236	
may be issued when... ..	163, 165	
<b>SET-OFF (see COUNTER-CLAIM).</b>		
<b>SHORT CAUSE:</b>		
what may be entered as ... ..	138	
practice on ... ..	138, 261	
<b>SITTINGS OF THE COURTS</b> ... ..	14, 245	
<b>SOLICITOR:</b>		
appearance by, without authority ... ..	51	
disclosures by ... ..	47, 248	
address for service ... ..	37, 49, 185, 219, 247, 277	
retainer by... ..	286	
next friend or relative to give a written authority to ... ..	23, 286	
neglecting to enter appearance ... ..	52, 286	
commencing action without authority ... ..	286	
change of ... ..	287	
may enter into agreement for fees ... ..	287	
undertaking to carry on action ... ..	288	
taking security from client ... ..	288	
enforcing payment of bill of costs ... ..	287, 288	
taxation of bill of costs ... ..	287, 288, 289	
allowing interest on bill ... ..	289	
may be ordered to pay costs improperly incurred ... ..	289	
lien of ... ..	289, 290	
set-off between parties allowed notwithstanding lien for costs ... ..	285, 290	
<b>SPECIAL CASE:</b>		
when stated ... ..	101, 144, 191, 258, 265	
by whom introduced ... ..	101	
stated by consent ... ..	101	
may be ordered when ... ..	102	
payment of money on ... ..	102	
to be printed ... ..	102	
by whom signed ... ..	102	
amendment of ... ..	102	

<b>SPECIAL CASE—continued:</b>		<b>PAGE</b>
entering for argument	...	102
where leave to set down necessary	...	102
delivering printed copy	...	103
before whom heard	...	103
setting down action on	...	103
when infant or married woman party to	...	103
by judge on interpleader	...	103, 191
power of referee or arbitrator to state	...	103, 144, 265
<b>STATEMENT OF CLAIM:</b>		
rules regulating delivery of	...	67, 68, 251
may be delivered though not required by defendant	...	67
not when writ specially indorsed	...	67
setting out facts in	...	68
how relief claimed in	...	68
statement of venue in	...	68
time for delivery of	...	67, 68
may be filed when	...	58, 69
amended, may raise new case	...	69
striking out matter in	...	69, 70
further, may be ordered	...	69
formal parts of	...	70
<b>STATEMENT OF DEFENCE:</b>		
effect of not delivering	...	73, 251
within what time to be delivered	...	73
how grounds of defence stated in	...	55, 74
payment to be pleaded in, when	...	74
after action brought	...	75
amendment of	...	75
embarrassing	...	76
formal parts of	...	76
striking out matter in	...	76
withdrawal of	...	93
plaintiff's proceedings after	...	94
in actions on bills of exchange, &c.	...	251
in actions to recover a liquidated demand	...	252
time for under Order XIV.	...	252
by virtue of a statute	...	252
default of	...	53, 73, 150, 252
<b>STOP ORDER</b>	...	169, note (e)
<b>SUBPENA:</b>		
by whom invented	...	3
<i>ad testificandum</i>	...	123
for payment of costs cannot be issued	...	163, 236
<b>SUMMONS AT CHANCERY CHAMBERS:</b>		
proper proceeding when	...	60, 188, 216
preparation of	...	188, 218, 221

**SUMMONS AT CHANCERY CHAMBERS—continued: PAGE**

service of ... ..	188, 219, 221
before whom heard ... ..	188, 189, 222
evidence in support of ... ..	127, 188, 223
order on ... ..	189, 218
taking opinion of judge on ... ..	189, 222
discharging order on ... ..	193, 230
attending by counsel ... ..	219
originating proceedings ... ..	216, 218, 219
address for service on ... ..	219
to proceed with accounts... ..	219, 221
to administer estate ... ..	216, 218, 221
proceedings in ... ..	216, 230

**SUMMONS IN CHAMBERS OF QUEEN'S BENCH****DIVISION:**

before whom heard ... ..	276
originating proceedings ... ..	277
service of ... ..	277
marking with name of a master ... ..	277
master may refer to judge ... ..	277
appeal from master ... ..	278
appeal from judge ... ..	278
order on ... ..	278
list of ... ..	279
under Debtor's Act ... ..	280
proceedings in ... ..	284

**SUMMONS FOR DIRECTIONS ... .. 65, 251****THIRD PERSONS:**

claiming contribution against... ..	51, 81, 253
notice of application ... ..	82
appearance and defence by ... ..	51, 82
default of appearance by... ..	82
judgment against ... ..	82
application for directions as to trial ... ..	82
costs against ... ..	83
claiming relief against fourth party ... ..	83
contribution against a co-defendant ... ..	83

**TIME:**

of sittings and vacations... ..	14, 15, 16, 245
general rules as to ... ..	62, 251
computation of ... ..	62
months ... ..	62
expiry of, on Sunday or holiday ... ..	62
meaning of clear days in computation of ... ..	62
of Long Vacation not reckoned, when ... ..	62
abridging ... ..	63
enlarging ... ..	63, 73, 94

<b>TRANSFER OF ACTIONS:</b>	<b>PAGE</b>
from one division to another ... ..	206, 281
on bankruptcy ... ..	207, note (e)
from one judge to another ... ..	207, 281
from and to district registries ... ..	208, 282
from and to County Court ... ..	210, 282
<b>TRANSFER OUT OF COURT</b> ... ..	86, 90, 255, 257
<b>TRIAL:</b>	
notice of ... ..	136, 137, 140, 141, 261
entering cause for ... ..	136, 137, 138, 261
countermanding notice of ... ..	137, 261
entering to be heard short ... ..	138
hearing in Chancery Division ... ..	139, 140
with a jury ... ..	139, 261, 262
in Queen's Bench Division ... ..	261, 262
default of plaintiff at ... ..	140, 262
default of defendant at ... ..	141, 262
rules as to address of council at ... ..	141, 263
adjournment of ... ..	142, 263
with assistance of assessors ... ..	142, 263
before referee ... ..	142, 143, 144, 264
new ... ..	147, 149, 268
<b>TRUSTEES:</b>	
may sue and be sued without joining the <i>cestui que</i>	
trusts ... ..	21, 22, 27
costs of ... ..	192, 233
<b>VACATIONS</b> ... ..	15, 245
<b>VENUE</b> ... ..	68, 140, 262
<b>WITNESS (see also AFFIDAVIT—EVIDENCE):</b>	
evidence of, how taken ... ..	117, 118, 258, 260
who may be ... ..	118, 260
refusing to be sworn ... ..	119, 121
giving evidence before examiner or master or on com-	
mission ... ..	121, 259
depositions of, to be printed, when ... ..	122
how compelled to attend ... ..	121, 123, 260, 265
cross-examination of, on affidavit ... ..	126, 127
enforcing attendance of, before referee ... ..	144
enforcing attendance before arbitrator ... ..	265
<b>WRIT OF SUMMONS:</b>	
action commenced by ... ..	17, 246
issued out of what office ... ..	17, 18, 202, 248
by whom prepared ... ..	17, 246
date of ... ..	17
teste of ... ..	17
must specify division of court ... ..	17, 246



WRIT OF SUMMONS— <i>continued</i> :	PAGE
must specify where defendant to appear ... ..	18
for service out of jurisdiction ... ..	18
marking with name of judge ... ..	18
indorsements on ... ..	35, 36, 37, 45, 247
special indorsement on ... ..	36, 247, 248
issue of ... ..	18, 40, 248
concurrent ... ..	40
service of ... ..	40, 41, 45, 248
on husband and wife ... ..	41
on infant ... ..	41
on lunatic ... ..	41
on partners ... ..	42
on corporation ... ..	42
on hundred ... ..	42
on company ... ..	42
on added defendant ... ..	43
out of jurisdiction ... ..	43, 44
substituted ... ..	45
in case of vacant possession ... ..	45
indorsement of service of ... ..	45, 66, 248
renewal of ... ..	46, 248
amendment of ... ..	47
disclosure as to issue of ... ..	47, 248

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